Supreme Court, U.S.
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In The
Supreme Court of the United States

October Term 1998

CANDACE L. COOPER,

Petitioner,

v.

STATE OF NORTH CAROLINA, on the relation of James E. Long, Commissioner of Insurance, as Liquidator of Twentieth Century Life Insurance Company,

Respondent.

GLENN H. MARTIN,

Petitioner,

v.

STATE OF NORTH CAROLINA, on the relation of James E. Long, Commissioner of Insurance, as Liquidator of Twentieth Century Life Insurance Company,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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Questions Presented

1. Whether a Summary Judgment based on affidavits made on information and belief is permissible under Federal Rule of Civil Procedure 56.

2. Whether a Summary Judgment based on affidavits made by an interested party or agents of an interested party in favor of that party is permissible under Federal Rule of Civil Procedure 56.

3. Whether a Summary Judgment based on copies of papers or parts thereof referred to in an affidavit but not sworn to or certified is permissible under Federal Rule of Civil Procedure 56.

4. Whether a Summary Judgment based on a criminal conviction not yet final is permissible under Federal Rule of Civil Procedure 56.

5. Whether denial of the Motions of Cooper and Martin for Leave to Amend Answer constituted abuse of discretion.

6. Whether denial of the Motions of Cooper and Martin for Leave to Amend Answer violated Cooper's and Martin's rights under the Fifth Amendment to the U.S. Constitution.

7. Whether North Carolina General Statute § 75D is a criminal or quasi-criminal statute, thus grant of summary judgment violated Martin's right to due process under the U.S. Constitution.

List of All Parties

State of North Carolina on the relation of James E. Long, Commissioner of Insurance, as Liquidator of Twentieth Century Life Insurance Co.

Glenn H. Martin

Candace L. Cooper

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None. The opinion of the Court of Appeals for the Fourth Circuit was unpublished.

Statement of Jurisdictional Grounds

The judgment of the Court of Appeals for the Fourth Circuit was entered on June 23, 1998. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. Sec. 2101(c).

Relevant Constitutional, Statutory and Rule Provisions

Federal Rule of Civil Procedure 56(e)provides in relevant part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Federal Rule of Civil Procedure 15(a) provides in relevant part:

> Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Amendment VI to the U.S. Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the

> crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

N.C.G.S. §75D-3 provides in relevant part that:

> (b) "Pattern of racketeering activity" means engaging in at least two incidents of racketeering activity that have the same or similar purposes, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated and unrelated incidents..."

N.C.G.S. §75D-4 provides in relevant part:

(a) No person shall:

> (1) Engage in a pattern of racketeering activity or, through a pattern of racketeering activities or through proceeds derived therefrom, acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money; or
> (2) Conduct or participate in, directly or indirectly, any enterprise through a pattern of racketeering activity whether indirectly, or employed by or associated with such enterprise; or * * *

N.C.G.S. §75D-8. Available RICO civil remedies, provides in relevant part:

> (c) Any innocent person who is injured or damaged in his business or property by reason of any violation of G.S. 74D-4 involving a pattern of

racketeering activity shall have a cause of action for three times the actual damages sustained and reasonable attorneys fees.

Statement of Case

The Commissioner of Insurance for the State of North Carolina brought suit as Liquidator of Twentieth Century Life Insurance Company (referred to as TCL) against Cooper, former corporate secretary and employee of the insurance company, asserting state law claims for damages based on North Carolina civil RICO remedies and conspiracy to commit fraud. The Commissioner brought suit against Martin, former Twentieth Century Life Insurance Company President, majority shareholder in the holding company which was the sole shareholder of the life insurance company, and employee of the insurance company, asserting claims for damages based on North Carolina civil RICO, breach of fiduciary duty, common law fraud, and conspiracy to commit fraud. Jurisdiction in the District Court was founded on diversity of citizenship, 28 U.S.C. 1332. Plaintiff is a North Carolina corporation. Defendants are citizens of Florida.

While criminal trials in the Middle District of Florida were pending, Cooper and Martin refused to answer specific allegations of the Complaint based on each of their rights under the Fifth Amendment to the U.S. Constitution, and this proceeding was stayed. Following conclusion of the criminal proceedings the stay was lifted.

On November 14, 1995, shortly after the initial date scheduled for the sentencing hearing on the criminal charges, counsel for Martin made their initial appearance and Moved for Leave to Amend. While no proposed amendment was submitted with the motion, the Motion noted that the government had moved to continue the sentencing hearing to November 27, 1995, and requested that Martin be "allowed to file his amended pleadings (10) ten days after the granting of this motion or ten days after the sentencing hearing, which ever is later." [A 20] Cooper made her motion to supplement her answers at a time when she was still scheduled for sentencing on November 9, 1995. [A 22]

Following a settlement conference in which the "Court recommended that the defendants work on settling this case by possibly signing a confession of judgment," [Docket notation] the court entered an Order denying leave to amend on January 16, 1996, reciting that "To date, the court still is in the dark with regard to what affirmative defenses and counterclaims Martin would add, if permitted to do so. Because the court perceives that permitting Martin to file an Amended Answer and counterclaims at this late date would be unduly prejudicial as well as futile, Martin's motion to file Amended Answer and counterclaims, too, is DENIED." [A 10][1] No recitation was made by the Court for the basis of its finding, how grant of Martin's Motion would be unduly prejudicial or the substantive or procedural basis upon which the Court concluded that Amendment would be futile.

Each of their Motions for Leave to Amend and for time for discovery were denied by the Court by Order dated January 16, 1996, on the grounds that granting leave would be unduly prejudicial and futile. [A 10]

By that same Order dated January 16, 1996, on Motion for Partial Summary Judgment by Plaintiff, the Court granted judgment against Defendant Cooper on the fraud claim in the amount of $9,085,425.67.

Glenn H. Martin, acting pro se, filed Affidavits in opposition to Plaintiff's Motion for Summary Judgment, dated January 18, 1996, (Martin Affidavits, A 652, 656), but recited "that to the best of my knowledge the foregoing AFFIDAVIT is true and correct, except as to those matters upon which I rely on information and belief, and as to those matters I do believe them to be true."

By Order dated February 1, 1996, the Court granted Plaintiff's Motion for Partial Summary Judgment against Defendant Martin on Counts I and II of the Complaint (North Carolina civil RICO) in the amount of $9,085,425.67, trebled to $27,256,277.

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[1]The court's final dispositive Order dated January 31, 1996, filed February 1, 1996, incorrectly recites that "Martin...neglected...to take advantage of an opportunity extended by the Magistrate Judge to amend his Answer...." The record reflects that no action was taken by the court prior to the January 16, 1996 Order. [JA 703]

By Order dated February 21, 1996, the Court entered judgment against Cooper in the amount of $9,085,425.67, and against Martin in the sum of $27,256,277. All other claims were voluntarily dismissed on motion of Plaintiff. No opinion or findings were filed, other than those contained in the Order of January 16, 1996, and February 1, 1996.

Supporting the judgments rendered were the following:

1. The Affidavit of Joseph B. Holloway, Jr., dated February 5, 1993, in which it the affiant states "I have personal knowledge of the facts set out in this affidavit, **except as to those matters set out on information and belief**...." No designation of what facts are on personal knowledge and what facts are information and belief is made in the affidavit. The affiant further states "I have assisted Commissioner Long and his deputies more or less continuously since March 1, 1991, with respect to the rehabilitation and liquidation of TCL and with respect to financial matters involving the company...."

2. The Affidavit of W. A. Spencer, in which the affiant states "I have personal knowledge of the facts set out in this affidavit, **except as to those matters set out on information and belief**...." No designation is made of what facts are on personal knowledge. The affiant further states "[S]ince January, 1985, I have served as a Senior Deputy Commissioner of Insurance for Company Services of the State of North Carolina. Since 1985 I have been a member of the Senior Management of the Insurance Department...."

3. The Affidavit of Melvin J. Dillon, in which the affiant states "Beginning in 1985 **I have served as a Special Deputy Commissioner of Insurance** to North Carolina Insurance Commissioner James E. Long * * * I have provided consulting services with respect to Twentieth Century Life Insurance Company...."

4. The Affidavit of W. H. Odell, in which the affiant states "I **have been requested by the Liquidator** of [TCL] to examine certain records of the Company and to give an opinion concerning certain matters relating to the reserve liability of the Company." The affiant futher states:

> This report is prepared for utilization only by the Liquidator * * * in connection with certain legal

> proceedings. * * * Our findings are based upon the information available to us. * * * [W]e did not perform an independent audit or verification of the basic redoreds [sic] of the Company. * * * It is possible that an examination of all data possibly available would result in additional findings.

5. Deposition[s] of Louann Foulkes, taken in other cases, and submitted as exhibits to Holloway's affidavit of February 5, 1993, and Cooper's Response to Plaintiff's Motion for Partial Summary Judgment, **not sworn or certified.**

6. Affidavit of Leigh Meininger, [A 97] Martin's Trustee in bankruptcy.

7. Copies of TCL 1989 Annual Statement and June 30, 1990, Quarterly Statements, **not sworn or certified.**

8. Order of Liquidation of TCL **not sworn or certified.**

9. The sentencing proceedings of Martin and Cooper, **not sworn or certified.**

10. Further Affidavit of Joseph B. Holloway, Jr. [October 12, 1994], in which the affiant states "I have personal knowledge of the facts set out in this affidavit, **except as to those matters set out on information and belief....**"

11. The Indictments against Cooper and Martin [A 65] in related criminal cases in the Middle District of Florida.

14. The verdicts in the trials of Cooper and Martin, and the plea agreement of Hevey, in related non-RICO criminal cases in the Middle District of Florida. [A 28, 33]

Jurisdiction in the Court of Appeals was founded on F.R.A.P. 3. Judgment was entered February 22, 1996, Notice of Appeal was filed by Cooper pro se on February 14, 1996 and Martin on March 18, 1996. The decision of the District Court was affirmed per curiam in an unpublished opinion "essentially on the reasoning of the district court." This appeal is from a final order.

Argument

Writ of certiorari should be granted in this case because the courts below outrageously and egregiously rendered judgment directly contrary to prior decisions of this Court construing the requirements of Federal Rule of Civil Procedure 56, Federal Rule

of Civil Procedure 15, and the spirit of the Rules as a whole. Without strict adherance to the requirements of Rule 56 by the lower courts, and supervision of that adherance by this Court, summary judgment practice becomes an opportunity for trial courts to adjudicate by prejudice, assumption, and hearsay without opportunity for litigants to test the credibility or accuracy of purported evidence, and an indictment of the fundamental fairness of the judicial process. The appropriateness of the exercise by this Court of its supervisory responsibility is enhanced where, as in this case, the Court of Appeals abdicates its supervisory function over the District Court by rendering an unpublished decision per curiam, failing to distinguish or othewise disclose the appropriate application of prior decisions of this Court directly in conflict with action taken by the District Court, in effect sanctioning the failure of the District Court to comply with the requirements of the Rules.

Strict adherance to the requirements of the Rules is even more essential to the impartial and fundamentally fair administration of justice where it is likely there will be prejudice against a party, as in this case where each of the defendants were convicted of related charges not having substantively identical material fact questions but arising out of the same transactions.

I. Summary Judgments

A. Standard of Review

Grant of a summary judgment is reviewed de novo. *Taggart v. Time Inc.*, 924 F.2d 43, 45-46 (2nd Cir. 1991). As stated by this Court in *Sartor v. Arkansas Natural Gas Corporation*, 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967 (1944):

> Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they

> really have issues to try. 321 U.S. at 627, 64 S.Ct. at 728

An issue is genuine if there is sufficient evidence supporting the claimed factual dispute to require a jury or judge to resolve the parties' differing version of the truth at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed. 202 (1986). If reasonable minds could differ as to the import of the evidence, a summary judgment should not be granted. Id., 477 U.S. at 251-52, 106 S.Ct. at 2512. Where a witness is interested, his credibility must be submitted to the jury as a question of fact. *Sartor*, 321 U.S. at 628, 64 S.Ct. at 729.

The governing substantive law determines what facts are material; only disputes over facts that might affect the outcome of the suit will preclude summary judgment. *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510.

The moving party has the burden of showing the absence of any genuine issues of material fact, thus the evidence must be viewed in the light most favorable to the opposing party—the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Adickes v. S. H. Kress and Company*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); *Anderson*, 477 U.S. at 255, 106 S.Ct. at 2513; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

Where the movant bears the burden of proof on an issue, "he must establish beyond all peradventure *all* of the essential elements of the claim or defense to warrant judgment in his favor." (emphasis in original) *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). To avoid summary judgment once the movant has met his burden, the nonmovant must "designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp. v. Catrett, 477 U.S. 317, 324 , 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

Federal Rule of Civil Procedure 56(e) provides that:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to

> testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Affidavits made upon information and belief do not comply with the rule and constitute no evidence. *Automatic Radio Mfg. Co., Inc. v. Hazeltine Research, Inc.*, 339 U.S. 827, 831, 70 S.Ct. 894, 896 (1950). When determining whether summary judgment is proper, statements contained in affidavits which would be inadmissible in evidence (such as statements of opinion, belief and hearsay) must be disregarded, *Neff v. World Publishing Company*, 349 F.2d 235, 253 (8th Cir. 1965), although evidence "admissible in content, in the sense that a change in form but not in content, for example a substitution of oral testimony for a summary of that testimony in an affidavit, would make the evidence admissible at trial" is within the intent of the Rule. *Celotex Corp.*, 477 U.S. at 324, 106 S.Ct. at 2553. Hearsay is entitled to no weight. *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 556 (5th Cir. 1980), rehearing denied 642 F.2d 1210, certiorari denied 102 S.Ct. 425, 454 U.S. 927, 70 L.Ed.2d 236.

Offered documents must comply with the Rule as well. "To be admissible, documents must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence." Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d §2722.

B. Substantial Portions of the Evidence Before the District Court Do Not Comply with the Standards Imposed by This Court

The state of the record presented for review is astonishing in its lack of compliance with the express terms of Rule 56. Of over 3,450 pages of materials submitted by TCL and approximately 50 pages submitted by Martin, less than 160 pages comply with the express terms of the Rule. The only two Affidavits complying with the requirement of Rule 56(e) that affidavits be "made on personal knowledge" are those of Melvin J. Dillon dated February

8, 1993, [A 25] an interested witness regularly employed by the North Carolina Commissioner of Insurance, and that of Leigh Meininger, [A 97] Martin's Trustee in Bankruptcy. Dillon's affidavit is not available to support the Martin judgment since filed in the Cooper case prior to the Order consolidating the Cooper and Martin cases, and not filed in support of the later Motion for Summary Judgment against Martin. The sole deposition in this case available for consideration is that of Louis J. Hevey, in which he refuses to answer any question and asserts in response to all questions his Fifth Amendment privilege.

One of two certified copies of a document is the Plea Agreement of Louis J. Hevey, Case No. 95-69-Cr-Orl-19, United States District Court, Middle District of Florida, Orlando Division, dated November 9, 1994. The second is the indictment and verdict in Case No. 95-69-Cr-Orl-19, United States District Court, Middle District of Florida, Orlando Division. [A 65, 28, 33][2] While the Verdict in the trial of Cooper and Martin and the plea agreement of Hevey are within the record, since apparently properly certified by the Clerk of the U.S. District Court for the Middle District of Florida, they are admissible under Federal Rule of Evidence 803(22) only "to prove any fact **essential** to sustain the judgment." Fed. R. Evid. 803(22). This limitation renders the great bulk of the "facts" found in the Hevey Plea Agreement inadmissible hearsay. Under the standard articulated by the Supreme Court in *Williamson v. U. S.*, 512 U.S. 594, 114 S. Ct. 2431, 129 L.Ed. 2d 476 (1994), Hevey's statements relevant to the actions of Martin and Cooper were **not** "against interest" under Federal Rule of Evidence 804(b)(3), and thus would not be admissible. The Indictment [JA 487-525] is also within the record, and is admissible and essential for the limited purpose of determining what facts are "**essential** to sustain the judgment,"

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[2]These assertions must be qualified, however, by the observation that neither of the counsel for appellants had in his possession a fully complete copy of the record due to the history of representation of Cooper and Martin by various geographically dispersed counsel and financial limitations which precluded obtaining a complete copy of the record directly from the court. No additional materials were brought to the attention of Petitioners or the Court of Appeals in the proceedings, however.

Fed. R. Evid. 803(22), by reference to the charges made for which a guilty verdict was rendered.

The balance of the materials before the District Court were based upon affidavits specifically made upon information and belief. As noted by the court in *Lark v. West*, 182 F.Supp. 794, 798, (D.C.D.C. 1960), affirmed 289 F.2d 898, certiorari denied 82 S.Ct. 114, 368 U.S. 865, 7 L.Ed.2d 63, "[B]elief, no matter how sincere, is not equivalent to knowledge, and facts set forth in an affidavit in opposition to a motion for summary judgment must be such as would be admissible in evidence should they be given from the witness stand during the trial of a case." The affidavits themselves do not disclose which facts are on personal knowledge and which facts are based on information and belief; thus, for purposes of summary judgment in taking the evidence in the light most favorable to the non-movant the affidavits should be disregarded in their entirety. *See Automatic Radio Mfg. Co., Inc*, supra. The documents attached to the defective affidavits, unless separately sworn or certified, must be disregarded as well since not meeting the express requirements of Rule 56(e). *See* Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* §2722. None other than as noted above are so sworn or certified.

C. Portions of the Evidence Before the District Court Which Did Comply with the Standards Imposed by This Court Are Insufficient to Support the Summary Judgment Rendered

Viewing the evidence complying with Rule 56 in the light most favorable to the opposing party Martin, *Adickes*, supra, U.S. at 157, S.Ct. at 1608, the Summary Judgment is not supported by the evidence.

1. Basis for Claim by and Status of North Carolina Commissioner of Insurance.

This action was brought by the North Carolina Commissioner of Insurance as Liquidator of TCL, and in no other capacity. In that capacity, the liquidator stands in the shoes of TCL, and may assert only claims which TCL could assert. *North Carolina v. Alexander & Alexander*, 680 F.Supp. 746 (E.D.N.C. 1988).

2. Summary Judgment under North Carolina RICO

a. Applicable Substantive Law

Summary judgment was rendered against Martin under the North Carolina state RICO statute, N.C.G.S. §75D-8. That section provides:

> §75D-8. Available RICO civil remedies.
>
> > (c) Any innocent person who is injured or damaged in his business or property by reason of any violation of G.S. 74D-4 involving a pattern of racketeering activity shall have a cause of action for three times the actual damages sustained and reasonable attorneys fees.

Thus, the following are four essential elements under the statute:

1. That TCL was an innocent person;
2. That TCL was injured or damaged in its business or property;
3. By reason of;
4. Any violation of N.C.G.S. 74D-4 involving a pattern of racketeering activity.

The meaning of each is discussed in detail in the following sections.

(1). An "innocent person"

N.C.G.S. §75D-8, in contrast to the federal civil RICO statute 18 U.S.C. 1962, requires by its express language that the plaintiff in a North Carolina RICO action be an "**innocent** person." "Innocent" in its relevant sense means "Not exposed to or familiar with something specified; unaware or ignorant," The American Heritage Dictionary, Second College Edition (1982), 663, or "Free from guilt; acting in good faith and without knowledge of incriminatory circumstances, or of defects or objections." Black's Law Dictionary, Fifth Edition. Thus, whether TCL is an innocent

person within the meaning of the statute depends on whether TCL as a corporate entity had knowledge of the acts of Martin.

Fletcher Cyclopedia of Corporations states the general rule regarding the knowledge of a corporation:

> [T]he general rule is well established that a corporation is charged with constructive knowledge, regardless of its actual knowledge, of all material facts of which its officer or agent receives notice or acquires knowledge while acting in the course of employment within the scope of his or her authority, even though the officer or agent does not in fact communicate the knowledge to the corporation." Fletcher Cyc Corp §790 (Perm Ed).

This rule has long been recognized by the Supreme Court of the State of North Carolina, *Le Duc v. Moore*, 15 S.E. 888, 889 (N.C. Sup. 1892), and the Fourth Circuit, *Phoenix Savings and Loan, Inc. v. Aetna Casualty & Sur. Co.*, 381 F.2d 245, 250 (4th Cir. 1967). Where the agent is not acting **solely** on his own behalf, but instead the officer and corporation have aligned but differing interests, no exception exists to the general rule, as the North Carolina Supreme Court held in *Hice v. Hi-Mil, Inc.*, 273 S.E.2d 268, 272 (N.C. 1981).

Even where interests are not so aligned, where the officer has knowledge when acting in his official capacity in a transaction, knowledge is imputed to the corporation. Thus in *Le Duc v. Moore*, supra., in an action by a receiver of a bank against the maker and payee on a promissory note, where the former president of the bank was payee and endorsed it to the bank for his own benefit, the court held that the bank took the note with notice of any defense existing in favor of the maker as against the payee at the time or before endorsement. The rule extends to fraudulent actions by the officer:

> Where the act of an officer of a corporation constitutes a fraud upon a third person, or upon another corporation of which he or she is also an officer, the first-mentioned corporation is

> chargeable with notice of the nature of the transaction, although the fraud is perpetrated for the officer's own benefit, where the officer also represents the corporation in the transaction." Fletcher Cyc Corp §829 (Perm Ed).

Thus, under North Carolina law, TCL was charged with proving that any act by Martin complained of as the basis for this action was taken **solely** for Martin's own benefit, **and** that no officer acted in his or her official capacity in taking the action. Otherwise, TCL had knowledge of the action, and is not innocent.

Louis Hevey, treasurer of TCL, with responsibility for seeing that all of the financial records of Twentieth Century were properly maintained, was aware that various bank accounts had been set up in the name of TCL but had not been included in the financial records of the company. [A 25] Martin had knowledge of all acts for which a guilty verdict was rendered against him. [A 33. 65][3] The conviction on which these facts are based is on appeal at the time of submission of this Petition. Martin asserts that solely for the purpose of determining the correctness of the grant of summary judgment to TCL, as the party with the burden of proof, viewing the evidence in the light most favorable to the non-movants Martin and Cooper requires the inference that the conviction might be reversed on appeal, and that therefore the facts derived from that conviction must be disregarded if supportive of the movant's position.

TCL has asserted on brief below that **all officers and directors had actual knowledge of the transactions** which form the basis of TCL's claim, thus TCL had not only imputed knowledge but also actual knowledge of the transactions. *Hice v. Hi-Mil, Inc.*, supra.; *Le Duc v. Moore*, supra. There is no evidence that any officer of TCL was not acting in their official capacity, or that the actions taken were not intended to benefit TCL, at least in

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[3]Although not briefed, Martin also asserts that reliance on a non-final conviction in the grant of summary judgment would be a violation of his right to due process under the United States Constitution, since reversal of the conviction after rendition of summary judgment based on the conviction would lead to the anomalous result of a final judgment with no evidence of a material fact.

part. To avoid imputation of even undisclosed knowledge to TCL, TCL was charged with proving the material facts that any act by Martin complained of as the basis for this action was taken **solely** for Martin's own benefit, **and** that **no** officer acted in his or her official capacity in taking the action. Fletcher Cyc Corp §829 (Perm Ed). There is no evidence to support such a finding, although there is substantial evidence to the contrary.

(2). That TCL was injured or damaged in its business or property

The essence of this element is simple; TCL must have been injured or damaged. It is elementary that no injury or damage can arise from money rightfully paid, and money is rightfully paid if paid pursuant to a valid contract between the parties. As held by the North Carolina Supreme Court:

> Notwithstanding the fiduciary relationship existing between officers and the corporation which they serve, contracts fixing the amount and method of paying compensation for services to be rendered are not void or voidable per se. ... The right of action which accrues for the fixing and taking by one in authority of salaries, bonuses, or other monies not honestly earned and fairly owing is based on fraud. When one seeks to recover for wrongs fraudulently inflicted, he must allege the facts which, if proven, will establish the fraud." *Fulton v. Talber*, 120 S.E.2d 410, 411 (N.C. 1961).

Thus under North Carolina law, where payments were made pursuant to contracts between TCL and Martin or others, TCL would have the burden of proving fraud to establish **any** damages for money so paid.

Substantial amounts were transferred between accounts held in the name of TCL and to Martin individually, in furtherance of a scheme or artifice to defraud money and property from **policy holders of TCL**, or the **North Carolina Life, Accident, and Health Insurance Guaranty Association** or **Florida Life and Health Insurance Guaranty Association**, or the **minority**

stockholders in Twentieth Century Financial Corporation of America (TCFCA). [A 33, 65] There is no amount ascertainable from the evidence properly before the district court , the indictment and verdict, regarding the amount by which TCL was damaged, if at all.

No scheme to defraud TCL is an element of the offenses charged in the Indictment and Verdict, thus it constitutes no evidence of damage to TCL. *United States v. Myers*, 38 F.R.D. 194, 196 (N.D. Cal. 1964). Thus movant TCL did not carry its burden of establishing this material fact, and summary judgment should not have been granted.

(3). By reason of

Although brought as an action under North Carolina civil RICO, the near identity of language used in that statute and the language found in the federal civil RICO statute, 18 U.S.C. §1964(c), and the absence of state court decisions interpreting the North Carolina statute justifies looking to federal precedent for guidance in interpreting the meaning of "by reason of." The United States Supreme Court explained the import of this rule of causation applied to civil RICO actions:

> As the Seventh Circuit has stated, "[a] defendant who violates section 1962 is not liable for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured." *Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384, 398 (1984), aff'd post, p. 606." *Sedima v. Imrex*, 473 U.S. 479, 496-497 (1985).

The Fourth Circuit addressed this question in *Busby v. Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990), in which it stated:

> [W]e believe *Sedima* instructs us to employ a traditional causation analysis in determining whether a RICO plaintiff has been injured "by reason of" a section 1962 violation. *Brandenburg v. Seidel*, 859 F.2d 1179, 1189 (4th Cir. 1988) (traditional proximate cause analysis applies to

> the "by reason of" language of §1964(c)). (footnote omitted) See also *Ocean Energy II v. Alexander & Alexander, Inc.*, 868 F.2d 740, 744 (5th Cir. 1989) (same); *Bass v. Campagnone*, 838 F.2d 10, 12 (1st Cir. 1988) (under Sedima, "the inquiry is not whether the plaintiff has alleged a direct or indirect injury, but rather whether he or she has alleged an injury that 'flows from' the predicate acts"). 896 F.2d at 840.

Thus TCL would have the burden of proving that the damages complained of were proximately caused by the violations made the basis of the complaint.

Even assuming that Martin's conviction will be affirmed on appeal, the predicate acts there established which potentially constitute evidence of a pattern of racketeering activity only relate to **damages which may have been caused against entities other than TCL**, since TCL was not an entity alleged to have been the object of scheme, only **policy holders** of TCL, or the **North Carolina Life, Accident, and Health Insurance Guaranty Association** or **Florida Life and Health Insurance Guaranty Association**, or the **minority stockholders in TCFCA**. [A 26, 58] *United States v. Myers*, supra.

As this Court wrote in *Sedima v. Imrex*, supra, at 496-497 (1985):

> As the Seventh Circuit has stated, "[a] defendant who violates section 1962 is not liable for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured." *Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384, 398 (1984), aff'd post, p. 606."

Since the predicate acts as alleged and proved under the Indictment and Verdict did not cause damage to TCL directly, it was incumbent upon TCL to establish how the "pattern of racketeering activity" comprised of those predicate acts was the proximate cause of harm to **TCL**, the plaintiff in this case. *Busby*,

supra. This it failed to do, and grant of summary judgment was improper.

(4). Any violation of N.C.G.S. 74D-4 involving a pattern of racketeering activity

N.C.G.S. §75D-4 provides in relevant part that:

(a) No person shall:

> (1) Engage in a pattern of racketeering activity or, through a pattern of racketeering activities or through proceeds derived therefrom, acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money; or
>
> (2) Conduct or participate in, directly or indirectly, any enterprise through a pattern of racketeering activity whether indirectly, or employed by or associated with such enterprise; or * * *

N.C.G.S. §75D-3 defines pattern of racketeering activity:

> (b) "Pattern of racketeering activity" means engaging in at least two incidents of racketeering activity that have the same or similar purposes, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated and unrelated incidents..."

Again, in the absence of state court decisions interpreting the North Carolina statute, federal precedent may provide guidance in interpretating the meaning of the term "pattern of racketeering activity," particularly in light of the fact that the North Carolina statutory provision is consistent with the interpretation of the federal provision adopted in *H. J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 238, 109 S.Ct. 2893, 2900, 106 L.Ed.2d 195 (1989). As noted by this Court in that case:

> A "pattern" is an "arrangement or order of things or activity," 11 Oxford English Dictionary 357

> (2d ed. 1989), and the mere fact that there are a number of predicates is no guarantee that they fall into any arrangement or order. It is not the number of predicates but the relationship that they bear to each other or to some external organizing principle that renders them "ordered" or "arranged." 492 U.S. at 238, 109 S.Ct. at 2900.

The counts of mail fraud upon which Martin was found guilty were based upon representation by Hevey to the Florida Insurance Commission regarding total premiums received and representations by Martin to TCFCA shareholders, [A 33, 65], which in turn were the basis for the money laundering counts. Thus, when taken together, these predicate acts could constitute a pattern of racketeering activity within the meaning of the North Carolina statute.

(5). Grant of TCL's Motion for Summary Judgment was erroneous

Grant of TCL's Motion for Summary Judgment was erroneous, since genuine issues of material fact exist with respect to at least three of the four essential elements on which TCL bore the burden of proof, and should be reversed.

3. TCL's Motion for Summary Judgment Against Cooper Was Erroneous Since Not Supported By Evidence Complying With Rule 56

Similarly, regardless of the standard of conduct (whether constructive fraud arising from breach of fiduciary duty as argued by TCL, or under N.C.G.S. 55-8-42 as argued by Cooper) by which Cooper's actions are measured, the evidence in compliance with Rule 56 fails to support the Summary Judgment rendered against Cooper since there is not evidence of causation of damage to TCL as a corporate entity, or the amount of damages, if any, as discussed above.

II. Failure To Allow Amendment and Supplementation Of The Defendants' Answers And State Affirmative Defenses And Counterclaims Is Reversible Error.

A. Standard of Review

The governing portion of Rule 15(a) of the Federal Rule of Civil Procedures provides that "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." The decision of the trial court regarding whether leave to amend should be granted is subject to reversal for abuse of discretion. *Foman v. Davis*, 83 S.Ct. 227, 230, 371 U.S. 178, 182, 9 L.Ed.2d 222 (1962). The Fourth Circuit, in *Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir. 1980), stated:

> Discretion to deny leave to amend is limited by the principle, embodied in Rule 15(a) that "leave shall be freely given when justice so requires," and by the general policy embodied in the Federal Rules favoring resolution of cases on their merits. See Fed.R.Civ.P. 1. A court may not then use its discretion either arbitrarily, or in a way that undermines the basic policy of the rule.

615 F.2d at 613.

B. When leave to amend may be denied

This Court articulated the standard for whether a district court's action denying a motion for leave to amend constituted an abuse of discretion in *Foman v. Davis*, when it wrote:

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), ¶¶ 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his

> claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules. 83 S.Ct. at 230, 371 U.S. at 182.

C. No prejudice could have been shown if leave to amend were to have been granted.

To demonstrate undue prejudice, more must be shown than that the opponent will be required to meet alternative or increased claims, *United States v. Hougham*, 364 U.S. 310, 316-317, 81 S.Ct. 13, 18, 5 L.Ed.2d 8 (1960), or cured or amplified defenses. *See* Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1487, n. 14-16. Where the opposing party is aware of the facts underlying a new theory of recovery or defense stated in the amended pleading, no undue prejudice exists justifying denial. *Davis*, at 613; *Yellow Bus Lines, Inc. v. Local Union*, 883 F.2d 132, 145 (D.C. Cir. 1989); *Sweetheart Plastics, Inc. v. Detroit Forming, Inc.*, 743 F.2d 1039, 1043 (4th Cir. 1984). Only where amendment will substantially adversely affect the opposing party's ability to contest the claim, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795 (1971) (amendment offered asserting new theory of defense one year after trial), or unduly increase discovery or delay the trial, Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1487, n. 15, does sufficient prejudice exist to justify denial.

The Order denying leave to amend recites that "permitting Martin to file an Amended Answer and counterclaims at this late

date would be unduly prejudicial...." [A 10] The Order fails to state any basis upon which leave to amend would be prejudicial, because leave would have caused no prejudice to TCL whatsoever under the law: allowing Martin to plead his case would have simply required that TCL prosecute its claim and defend against asserted affirmative defenses and counter-claims on the merits instead of limited pleadings. No showing was made by TCL that allowing leave would cause undue prejudice by substantially adversely affecting its ability to contest the claim, or would unduly increase discovery. To the contrary, TCL asserted in its Response to Martin's Motion "that it did not desire to engage in any discovery because the six week federal criminal trial had effectively revealed all of the evidence relevant to the matters in controversy." As in *Davis*, TCL was "fully aware of the events giving rise to the action, allowance of the amendment could not in any way prejudice the preparation of the defendant's case." 615 F.2d at 613. If no prejudice will accrue to the opponent, the amendment should be allowed. *Davis*, 615 F.2d at 613; Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 1487.

D. Martin's Motion for Leave to Amend was timely.

Although not specifically addressed in the court's Order, TCL stated in its Response that "...if the relief requested by the Defendant Martin is granted the trial of this matter, currently scheduled for February 18, 1996, [sic[4]] will inevitably be delayed." [A 10] No suggestion was made, however, how such delay might prejudice TCL. The Fourth Circuit, writing in *Sweetheart Plastics, Inc.* , supra, at 1043, held that "Absent prejudice to the opposing party, the mere fact that an amendment is offered late in the case is not enough to bar it." This rule is also stated by the court in *Security Insurance Company of Hartford v. Tucker & Associates, Inc.*, 64 F.3d 1001, 1009 (6th Cir. 1995):

> Delay alone, however, does not justify the denial of leave to amend. Rather, **the party opposing a motion to amend must make some significant showing of prejudice to prevail**. "Delay that is

[4]The correct date was March 18, 1996.

> neither intended to harass nor causes any ascertainable prejudice is not a permissible reason, in and of itself to disallow an amendment of a pleading[.]" *Moore v. City of Paducah*, 790 F.2d 557, 561 (6th Cir. 1986) (quoting *Tefft v. Seward*, 689 F.2d 637, 639 n.2 (6th Cir. 1982)).

64 F.3d at 1009. (emphasis added)

It is clear from Martin's Motion that any delay was not intended to harass, but was founded solely on his desire to preserve his constitutional right against possible self-incrimination under the Fifth Amendment to the United States Constitution. Thus the Motion to Amend, initially made immediately after the scheduled sentencing date, requests that leave be granted to amend for the first time promptly following sentencing — "ten days after the granting of this motion or ten days after the sentencing hearing, which ever [sic] is later." [A 20] Not only was no "significant showing of prejudice" made by TCL, **no** showing of prejudice was made by TCL.

Even were some prejudice to be inferred, however, the delay was not excessive and was excusable, and amendment should have been allowed. *See* Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1488. Where delay is attributable to a change in circumstances, such as completion of other pending legal proceedings, *Security Insurance Company of Hartford* , supra, (case dormant for 13 of 16 months due to pending bankruptcy); *Bush v. Muncy*, 659 F.2d 402, 413 (4th Cir. 1981), (motion made following mooting of prior requested relief); or acquisition of new information in course of proceeding, *Island Creek Coal Company v. Lake Shore, Inc.*, 832 F.2d 274 (4th Cir. 1987) (delay of 3 1/2 years after inception of action, but only 3 months after receipt of information obtained through deposition of defendant's witness); or action by the Court hearing case, *Yellow Bus Lines, Inc. v. Local Union*, supra, at 145, (two months elapsed between the March 31, 1984 hearing at which the court first expressed doubts about the deficiencies of the original pleading and Yellow Bus' request to amend those pleadings), delay must be determined from the time of the change in circumstances. Only with sentencing would the pending parallel criminal have come to

a conclusion, and would Martin no longer have had reason to assert his Fifth Amendment privilege.

Martin moved with more than reasonable alacrity and in good faith to correct his pleadings, filing on the day his counsel made his first appearance and requesting only ten days in which to amend his Answer after completion of the parallel proceeding. At the time of the motion, *this* action against Martin was only one year and four months old, including the period prior to removal to the District Court, and only eleven months had passed since the original Answer was filed pro se. For nine months of that period the proceedings had been stayed, thus **this case had been in active litigation for only eight weeks since the filing of the original Answer, regardless of the status or duration of other related proceedings. No showing was made by TCL of the need for expedited disposition of this matter.**

Given the size of the claim against Martin, the complexity of the underlying facts, and the potential counterclaim for intentional wrong-doing by the Department of Insurance of the State of North Carolina, justice required that leave to amend be granted.

E. Futility

In its Order, the District Court states that "permitting Martin to file an Amended Answer and counterclaims ...would be ... futile...." [A 10] The Fourth Circuit wrote in *Davis*, 615 F.2d at 613, "Unless a proposed amendment may clearly be seen to be futile because of substantive or procedural considerations, see, e.g., *DeLoach v. Woodley*, 405 F.2d 496, 497 (5th Cir. 1968), conjecture about the merits of the litigation should not enter into the decision whether to allow amendment." It is mysterious how the Court could have arrived at any reasoned evaluation of applicable substantive or procedural considerations since the Order recites "To date, the court still is in the dark with regard to what affirmative defenses and counterclaims Martin would add, if permitted to do so."

Clearly, no showing was made by TCL that no possible affirmative defense or counterclaim would have merit. A more reasonable inference is that the Court indulged in impermissible conjecture about the merits of the litigation, particularly in light of the settlement conference direction by the Court eight days prior

to entry of the Order. That direction is reflected by the docket entry that "Court recommended that the defendants work on settling this case by possibly signing a confession of judgment. The court will give counsel until Tuesday, 1/9/96 to meet/speak with the defendants and discuss settling this case by entering a confession of judgment."

Had the Court simply granted leave to amend when requested two months before its action (whether outright or on condition), as it should have, it would have had full knowledge of the affirmative defenses and counterclaims which Martin would have asserted, and would have been able to reach a **reasoned** evaluation of whether they were futile as a matter of law, and not have acted "in the dark." "In the dark," the Court could not have possibly seen whether the potential amendments were clearly futile, thus denial of leave to amend was improper.

F. Conditions

Assuming arguendo that the Court perceived on undisclosed grounds the possibility of undue prejudice in granting leave without prior presentation of the proposed amendment, the Court might well have conditioned consideration of the Motion on submission of the proposed amendment. As noted in Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 1486:

> [T]he court may use its discretion to impose conditions of the allowance of a proposed amendment as an appropriate means of balancing the interests of the party seeking the amendment and those of the party objecting to it. The imposition of terms often will further the rule's liberal amendment policy. If the party opposing the amendment can be protected by the use of conditions from any possible prejudice that might result from the untimeliness of the amendment, there is no justifiable reason for not allowing it.

This course was adopted by the District Court in *Schwab v. Nathan*, 8 F.R.D. 227 (D.C.N.Y. 1948).

The District Court in the instant case, however, chose to simply deny Martin's Motion for Leave to Amend. This action, in the words of this Court in *Foman*, "is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." 83 S.Ct. at 230, 371 U.S. at 182. Its refusal to give leave to amend should be reversed.

G. The court thwarted the constitutionally-protected right of Martin and Cooper against self-incrimination by refusing amendment and supplementation once the criminal trials were concluded.

After the verdict in the criminal case in Florida, Cooper also sought to address the allegations made in TCL's complaint. Cooper explained in her supporting memorandum in the district court that she wished to "present other or further defenses than those set forth in her original Answer – something she could not do previously without fear of self-incrimination." By denying the request, the court thus punished Cooper for previously exercising her constitutional right against self-incrimination.

The Fifth Amendment privilege against self-incrimination protects an individual not only from involuntarily becoming a witness against herself in a criminal proceeding, but also from answering specific allegations in the complaint in a civil action and from filing responses to interrogatories that might incriminate her in future criminal actions. *See, Rogers v. Webster*, 776 F.2d 607 (6th Cir. 1985), and *National Acceptance Co. of America v. Bathalter*, 705 F.2d 924 (7th Cir. 1983). Of course, a blanket assertion of that right might be insufficient to avoid a judgment on the pleadings. *North River Insurance Co., Inc. v. Stefanou*, 831 F.2d 484 (4th Cir. 1987), cert. denied, 486 U.S. 1007, 108 S.Ct. 1733, 100 L.Ed. 196 (1988). But, in the present case, in the shadow of sentencing, both Cooper and Martin moved to amend and supplement their answers, not resting upon a "blanket assertion" of her privilege. Despite that pending motion, the Court granted summary judgment on the scant ground that Cooper had not offered a proposed amendment even though the Court conceded that no rule required her to do so. This would hardly be

a compelling basis for depriving Cooper of her rights. *See, LaSalle Bank Lake View v. Seguban*, 54 F.3d 387 (7th Cir. 1995).

III. North Carolina General Statute § 75D is a criminal or quasi-criminal statute, thus grant of a summary judgment violates the defendant Martin's right to due process under the U.S. Constitution.

A. A statute may be civil in form, but criminal for purposes of constitutional safeguards.

This Court has considered the question of when a statute civil in form is quasi-criminal or criminal for purposes of protections afforded by the U.S. Constitution. In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167, 83 S.Ct. 554 (1963), it held that whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, and whether the behavior to which it applies is already a crime, are all factors for examination in making such a determination, as is the intent of the legislature. Although N.C.G.S. §75D-4(b) provides that the statute is to be civil, the declaration is found in N.C.G.S. §75D-2(b) that "The General Assembly declares that the purpose and intent of this Chapter is: **to deter** organized **unlawful activity by imposing** civil equitable **sanctions** against this subversion of the economy by **organized unlawful elements;**...."

Clearly the purpose of this act is to deter criminal acts, falling squarely within the factors set out in *Kennedy v. Mendoza-Martinez*, supra. This conclusion has been reached by at least one commentator: "The clause purporting to declare a RICO violation a civil offense is merely a subterfuge for the general assembly's true intention." Note: *North Carolina RICO: A Critical Analysis and User's Guide*, 66 N.C.L. Rev. 445, 453.

As written in *Kennedy v. Mendoza-Martinez*:

> This being so, the Fifth and Sixth Amendments mandate that this punishment cannot be imposed

> without a prior criminal trial and all its incidents, including indictment, notice confrontation, jury trial, assistance of counsel, and compulsory process for obtaining witnesses. If the sanctions these sections impose is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking. We need go no further.

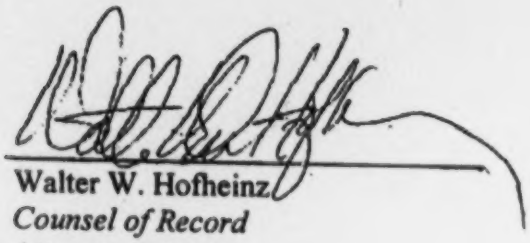
372 U.S. at 167. Accordingly, summary judgment in favor of the Commissioner of Insurance of the State of North Carolina as Liquidator of TCL should be reversed.

Conclusion

The summary judgment rendered for TCL against each of Martin and Cooper are not supported by evidence meeting the requirements imposed by Rule 56. The district court's failure to grant leave to amend and supplement under Rule 15 to each of Cooper and Martin was an abuse of discretion, and violated the defendants' right against self-incrimination under the U.S. Constitution. North Carolina General Statute § 75D is a criminal or quasi-criminal statute, thus grant of a summary judgment violates the defendant Martin's right to due process under the U.S. Constitution.

Writ of certiorari should be granted in this case because the courts below rendered judgment directly contrary to prior decisions of this Court construing the requirements of Federal Rule of Civil Procedure 56, Federal Rule of Civil Procedure 15, and the spirit of the Rules as a whole. Without strict adherance to the requirements of the Rules and the procedural protections afforded litigants, and supervision of adherance by this Court, summary judgment practice becomes an opportunity for trial courts to adjudicate by prejudice, assumption, and hearsay without opportunity for litigants to test the credibility or accuracy of purported evidence, and an indictment of the fundamental fairness of the judicial process.

Respectfully submitted this 21st day of September, 1998.



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No. 98 491 SEP 21 1998

OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term 1998

CANDACE L. COOPER,

Petitioner,

v.

STATE OF NORTH CAROLINA, on the relation of James E. Long, Commissioner of Insurance, as Liquidator of Twentieth Century Life Insurance Company,

Respondent.

GLENN H. MARTIN,

Petitioner,

v.

STATE OF NORTH CAROLINA, on the relation of James E. Long, Commissioner of Insurance, as Liquidator of Twentieth Century Life Insurance Company,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Appendix to Petition for Writ of Certiorari

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STATE OF NORTH CAROLINA,
on relation of James E. Long,
Commissioner of Insurance,
as Liquidator of Twentieth Century
Life Insurance Company,

Plaintiff - Appellee,

v.

GLENN H. MARTIN,

Defendant - Appellant,

CANDACE L. COOPER,

Defendant,

LOUIS J. HEVEY,

Defendant,

(CA-92-783-5-F, CA-94-850-5-F2)

Entered: June 23, 1998
Argued: May 7, 1998
Decided: June 23, 1998

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Fox, District Judge.

Before WIDENER, NIEMEYER, and LUTTTG, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ARGUED: Walter Wm. Hofheinz, LAW OFFICE OF WALTER WM. HOFHEINZ, Dallas, Texas; Noel Lee Allen, ALLEN &

PINNIX, P.A., Raleigh, North Carolina, for Appellants. V. Lane Wharton, Jr., BODE, CALL & STROUPE, L.L.P., Raleigh, North Carolina, for Appellee. ON BRIEF: Anthony D. Taibi, BODE, CALL & STROUPE, L.L.P., Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Candace L. Cooper and Glenn H. Martin appeal the district court's orders granting summary judgment to the Plaintiff on the claim of breach of fiduciary duty as to Cooper and for violations of North Carolina Racketeer Influenced and Corrupt organizations Act, N.C. Gen. Stat. § 75D. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm essentially on the reasoning of the district court. North Carolina v. Cooper, No. CA-92-783-5-F, North Carolina v. Martin, No. CA-94-850-5-F2 (E.D.N.C., Jan. 16, 1996, Feb. 1, 1996; Feb. 22, 1996).

AFFIRMED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA,
WESTERN DIVISION

STATE OF NORTH CAROLINA,
on relation of James E. Long,
Commissioner of Insurance,
as Liquidator of Twentieth Century
Life Insurance Company,

Plaintiff,

v.

GLENN H. MARTIN,
CANDACE L. COOPER,
LOUIS J. HEVEY,

Defendants.

Entered: February 22, 1996

JUDGMENT

____Jury Verdict. This action came before the Court for a Trial by jury. The issues have been tried and the jury has-rendered its verdict.

X Decision by Court. This action came on trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

1. All claims against Defendants Cooper and Martin as to which summary judgment has not already been entered are hereby DISMISSED;

2. In case no.: 92-CV-783-5-F judgment is entered against Defendat Candace L. Cooper in the sum of $9,085,425.67, and in case no. : 5:94-CV-850-F2 judgment is entered against Defendant Glenn H. Martin in the sum of $27,256,277.01;

The above judgement was entered today, February 22, 1996, and a copy mailed to:

(Names omitted)

February 22, 1996 David W. Daniel

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA,
WESTERN DIVISION

STATE OF NORTH CAROLINA,
on relation of James E. Long,
Commissioner of Insurance,
as Liquidator of Twentieth Century
Life Insurance Company,

Plaintiff,

v.

GLENN H. MARTIN,
CANDACE L. COOPER,
LOUIS J. HEVEY,

Defendants.

Entered: February 21, 1996

ORDER

The following of plaintiff's Motions are ALLOWED:

1. To voluntarily dismiss all claims against defendant Cooper as to which summary judgment has not been entered;

2. To voluntarily dismiss all claims against defendant Martin as to which summary judgment has not been entered;

3. To direct the Clerk of Court to enter judgment pursuant to Rule 79, Fed. R. Civ. P. as against defendant Cooper in the sum of $9,085,425.67;

4. To direct the Clerk of Court to enter judgment Pursuant to Rule 79, Fed. R. Civ. p., as against defendant Martin in the sum of $27,256,277.01.

It is therefore ORDERED that:

1. All claims against defendants Cooper and Martin as to which summary judgment has not already been entered are hereby DISMISSED;

2. The Clerk of Court is DIRECTED to enter judgment pursuant to Rule 79, Fed. R. Civ. P., as follows:

a. In case No. 92-CV-783-5-F, as against defendant Candace L. Cooper, in the sum of $9,085,425.67; and

b. In case No. 5:94-CV-850-F2, as against defendant Glenn H. Martin, in the sum of $27,256,277.01.

The court perceives that the rulings announced herein resolve all the matters which properly have been brought before it, and that the consolidated cases now may be closed. The parties are DIRECTED immediately to notify the Clerk of Court if they perceive other matters remaining for resolution.

SO ORDERED.

This 21st day of February, 1996.

/s/ James C. Fox
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA,
WESTERN DIVISION

STATE OF NORTH CAROLINA,
on relation of James E. Long,
Commissioner of Insurance,
as Liquidator of Twentieth Century
Life Insurance Company,

Plaintiff,

v.

GLENN H. MARTIN,
CANDACE L. COOPER,
LOUIS J. HEVEY,

Defendants.

Entered: January 31, 1996

ORDER

This matter came on for a hearing before the undersigned sitting at Wilmington, North Carolina, on January 24, 1996. Present were Mr. Lane Wharton for Twentieth Century Life Insurance Company (Twentieth Century) and Mr. Mark Jochem for defendant Glenn Martin. This order is entered to memorialize rulings announced in open court, and to address the remaining pending matters in these consolidated cases.

Pursuant to Fed. R. Civ. P. 41, the plaintiff's Motion for leave to dismiss Counts I and II against defendant Hevey is ALLOWED. The court's January 4, 1996, order denying Noel L. Allen's Motion to Withdraw as Counsel for Defendant Candace L. Cooper is hereby VACATED, and that motion is ALLOWED. Defendant Cooper is ORDERED to advise the court within five (5) days of receipt of this order whether she appears in this case pro se. The court notes Ms. Cooper's current address as Candace Cooper, #17795-018, FCI-Butner, P. 0. Box 2000, Catawba West, Butner, NC 27859.

Martin's request for leave to file out of time his Response to Twentieth Century's Motion for Summary Judgment is

ALLOWED. [fn1 That response, which is designated a "Reply," has been filed as of January 22, 1996.] Twentieth Century has filed a Reply thereto, and the matter is ripe for disposition.

Martin's position is that his 25 criminal convictions in the Middle District of Florida for such offenses as conspiracy to commit mail fraud, money structuring and money laundering, and committing those substantive offenses in relation to his dealings with Twentieth Century and other corporations, are not based on the identical incidents alleged in the Complaint in Counts T and II -- violations of North Carolina's RICO statute. The Complaint alleges, inter alia, that Martin conspired to commit and did commit mail fraud, that he caused false financial statements of Twentieth Century to be filed pursuant to that conspiracy, and that he embezzled funds from Twentieth Century. Martin contends that the predicate acts underlying his 25 convictions are "unrelated" to incidents alleged in the Complaint as predicate acts for Counts I and IT. Martin's "Reply" at 7.

Twentieth Century, all the other hand, contends that the offenses for which Martin was convicted were all part of the same scheme described in the Complaint to obtain money from Twentieth Century policy holders by mail fraud, then to convert premiums to his own use through money structuring and laundering. Twentieth Century also relies on statements contained in the plea agreement of co-defendant, Louis Hevey, as evidence of Martin's participation in the conspiracy to defraud Twentieth Century.

Twentieth Century explains that it does not contend that Martin's convictions are conclusive in establishing the R.I.C.O. claims, but, rather, that they constitute some evidence to support each element of those claims. The burden falls on Martin, as the non-moving party, to demonstrate that he can produce competent evidence to the contrary. Cf. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

The only evidence Martin has proffered is his affidavit, dated January 18, 1996, which addresses his contentions that a genuine issue of material fact exists because he believes (i) Twentieth Century owes him money or, in the alternative, that an entity with which he was associated is owed money by Twentieth Century; and (ii) Twentieth Century has sufficient assets to pay the claims of its creditors because a parcel of real estate has

appreciated in value. Neither of these points is relevant to the existence or nonexistence of material facts related to the merits of Twentieth Century's substantive claims in Counts I and II of the Complaint. Stated another way, Twentieth Century's proffer of evidence in support of its RICO claims is, unrebutted. Indeed, Martin consistently has failed to take timely advantage of any opportunity to advance a serious defense to the claims. [fn2 As the court outlined in its order of January 16, 1996, Martin, neglected between September and November 1995, to take advantage of an opportunity extended by the Magistrate Judge to amend his Answer and to conduct discovery. By the time Martin purportedly was ready to do so, this court determined that accommodating him would be unduly prejudicial to Twentieth Century as well as futile. Any suggestion by Martin that his "case had been at issue for less than 30 days" before the January 16th order is disingenuous, at best.] For the foregoing reasons, and those set forth more fully in Twentieth Century's Memorandum in Support of Motion for Partial Summary Judgment and Reply, that Motion for Partial Summary Judgment is ALLOWED as to Counts I and II of the Complaint. Twentieth century is entitled to judgment in the principal sum of $9,085,425.67, which sum is to be trebled pursuant to N.C. Gen. Stat. 75D-8(c). Martin's request for an order, pursuant to 28 U. S. C. 1292 (b) , certifying the January 16, 1996, order f or interlocutory review is DENIED.

Counsel for the plaintiffs in both consolidated cases are DIRECTED to advise the court within ten (10) days from the date of service hereof whether they intend to pursue the remaining claims against defendants Cooper and Martin.

SO ORDERED. This 31st day of January, 1996.

/s/ James C. Fox
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA,
WESTERN DIVISION

STATE OF NORTH CAROLINA,
on relation of James E. Long,
Commissioner of Insurance,
as Liquidator of Twentieth Century
Life Insurance Company,

Plaintiff,

v.

GLENN H. MARTIN,
CANDACE L. COOPER,
LOUIS J. HEVEY,

Defendants.

No. 92-CV-783-5-F
No. 5:94-CV-850-F2

Entered: January 16, 1996

ORDER

These consolidated cases arise from events which allegedly transpired after the Twentieth Century Life Insurance Company was acquired by Glenn H. Martin and corporations he owned or controlled. Since these lawsuits were filed, defendants Martin, Hevey and Cooper have been convicted of federal criminal offenses related to their dealings with Twentieth Century, and all three have been sentenced to serve periods of incarceration in federal facilities. In addition, each defendant has been ordered to pay restitution in the sum of approximately $9.75 million. The court is informed that the restitution order may be the subject of appeal in some or all of the criminal cases.

The following motions in these consolidated civil cases are ripe for ruling:

Long's motion for partial summary judgment as against defendants Cooper and Hevey in No. 92-783;
Cooper's motion to amend her answer in No. 92-783;

Martin's motion to amend his answer and to add counterclaim, and to extend time for discovery in No. 94-850;
Martin's motion for judgment on the pleadings in No. 94-850.

The facts set forth in the plaintiff's Memorandum supporting the Motion for Partial Summary Judgment as against defendants Cooper and Hevey in No. 92-783, are, to date, uncontested, in that the defendants have claimed Fifth Amendment privilege against self-incrimination and, therefore, have neither given sworn testimony in this case, nor tendered versions of the facts which differ from that offered by the plaintiffs. The court can perceive of no benefit in adding to the bulk of this case file by reiterating the underlying facts. Reference is made to plaintiff's renditions thereof contained its dispositive motions.

I. COOPER'S MOTION TO AMEND ANSWER

Cooper has invoked her Fifth Amendment privilege against self-incrimination to date in this litigation. On September 25, 1995, Magistrate Judge Denson provided that Cooper would be permitted to move for leave to supplement her Answer to the Complaint herein on or before October 9, 1995. On October 10, 1995, Cooper so moved, without specifying the substance of supplemental pleadings in a proposed Amended Answer. She argued that no Local Rule or Rule of Civil Procedure requires that she attach a proposed Amended Answer to her motion, and that her failure to do so is no reason to deny her leave to so amend.

Although Cooper is correct that there is no requirement that she attach a proposed Amended Answer, her failure to do so leaves the court without any basis for making an informed determination of the merit of her motion to file such a pleading. Consequently, although Cooper's motion was filed in a timely manner, she has not made any showing of a factual or legal basis therefor.

Furthermore, although leave to amend "shall be freely given," the court perceives that amendment at this late date would not only be unduly prejudicial to the plaintiff but also would be futile. See, e.g., Johnson v. Oroweat Foods Co., 785 F.2d 503,

510 (4th Cir. 1986). For those reasons, Cooper's Motion to Amend her Answer is DENIED.

II. MOTION FOR PARTIAL SUMMARY JUDGMENT --No. 92-783-CIV-5 --FRAUD CLAIMS AGAINST COOPER & HEVEY

Even before these consolidated civil actions were stayed pending completion of the criminal prosecutions in Florida, plaintiff Long moved for Partial Summary Judgment as against defendants Cooper and Hevey on Long's claims of fraud.

A. Hevey

Because defendant Hevey has indicated that he does not intend to defend against the claims filed against him, and has not, in fact, done so, Long's Motion for Partial Summary Judgment is ALLOWED against Hevey on the fraud claim -- Count III of the Complaint. Long is entitled to entry of partial judgment against Hevey in the principal amount of $9,085,425.67.

B. Cooper

Cooper has filed a response to the instant motion in which she contends that summary judgment cannot be had on the fraud claim, because that claim is based on an alleged breach of fiduciary duty, and she had no fiduciary duty to the North Carolina Department of Insurance. Cooper admits, of course, that she "likely" owed a fiduciary duty to the corporation. Long points out that breach of a fiduciary duty is constructive fraud under North Carolina law, and that he has brought this action as liquidator of Twentieth Century and is asserting the claims of that corporation. He does not assert any claims he may have in his own right as regulator.

None of Ms. Cooper's arguments has merit with regard to the instant motion. For the reasons set forth in Long's Memorandum in Support of Motion for Partial Summary Judgment and in his Reply to Cooper's Response thereto, that motion is ALLOWED. Long is entitled to partial summary

judgment as against defendant Cooper in the principal amount of $9,085,425.67.

III. MARTIN'S MOTION TO FILE AMENDED ANSWER ADD COUNTERCLAIM AND EXTEND DISCOVERY No. 5:94-CV-850

Martin, like Cooper, initially filed an Answer in which he primarily invoked his Fifth Amendment privilege against self-incrimination. Also like Cooper, the Martin case was stayed by Magistrate Judge Denson pending the criminal proceedings in Florida.

On September 25, 1995, Judge Denson lifted the stay as to all matters except plaintiff-initiated discovery. In that same order, Judge Denson extended Martin's opportunity to conduct discovery until November 24, 1995.

On November 14, 1995, Martin's lead and local counsel entered their notices of appearance for the first time, although the record is clear that lead counsel, Mr. Jochem, had been representing Martin's interests at least since the September 25, 1995, telephone conference with Judge Denson. And, although the stay had been lifted as of that date, Mr. Jochem did not move to amend Martin's Answer and to add a counterclaim until November 14th. He also moved on that date to extend the discovery deadline until December 15 for the sole purpose of deposing certain named persons. Twentieth Century responded in opposition to the November 14th motions.

Martin, like Cooper, did not submit a proposed Amended Answer. To date, the court still is in the dark with regard to what affirmative defenses and counterclaims Martin would add, if permitted to do so. Because the court perceives that permitting Martin to file an Amended Answer and counterclaims at this late date would be unduly prejudicial as well as futile, Martin's motion to file Amended Answer and counterclaims, too, is DENIED. See, e.g. State of North Carolina ex rel. Long v. Alexander & Alexander, 711 F. Supp. 257, 259-60 (E.D.N.C. 1989).

On November 14, 1995, Martin filed a motion for leave to extend the discovery deadline in order to depose Joseph Holloway, N.C. Dept. of Insurance; Melvin Dillon, Contractor, N.C. Dept. of Insurance; Sandy Acton, Contractor, N.C. Dept. of

Insurance; Mike Blinson, North Carolina Guaranty Association; and James Long, Commissioner of N.C. Dept. of Insurance. Counsel for Martin had indicated during the September 25, 1995, telephone status conference with Magistrate Judge Denson that he intended to conduct discovery, and Judge Denson extended discovery for Martin until November 24, 1995. However, following that conference call, Martin's counsel never served any discovery request or notice of deposition.

Rather, on November 6, 1995, counsel for Martin telephoned plaintiff's counsel indicating a desire to depose four people during or just after Thanksgiving week. Plaintiff's counsel offered several dates between November 9 and 22, on which these witnesses would be available. However, on November 14, 1995, Martin moved for another extension of the discovery deadline to December 15, so that he could take the depositions during "a three day period when all parties are available." Martin's Motion to Extend Time for Discovery at 14. It was at this point that the undersigned requested the case file and, upon reviewing it, scheduled a status conference with counsel for the parties.

For the reasons more fully set forth in the plaintiff's response in opposition to this motion, Martin's Motion to Extend Time for Discovery is DENIED.

IV. MARTINIS MOTION FOR JUDGMENT ON LEADINGS OR FOR SUMMARY JUDGMENT

On December 21, 1995, defendant Martin filed a Motion for Judgment on the Pleadings or, in the alternative, for Summary Judgment. The plaintiff filed its response on January 2, 1996.

In the instant motion, Martin attacks Counts I and II of the Complaint which allege violations of the North Carolina Racketeering Influence and Corruption organizations ("RICO") Act, N.C. Gen. Stat. SS 75D-1, et seq. The Complaint alleges predicate acts of mail fraud, embezzlement and willful filing of a false annual statement.

Martin asserts that the plaintiff -- the State of North Carolina on relation of James E. Long Insurance Commissioner as liquidator of Twentieth Century -- cannot sue Twentieth Century's former president, Glenn Martin, under North Carolina RICO Act for allegedly stealing more than $9 million in insurance premiums

sent to Twentieth Century by hundreds of policyholders, while leaving Twentieth Century obligated to pay out claims to those policyholders. Martin relies as authority for his position on Corcoran v. American Plan Corp., 886 P.2d 16 (2d Cir. 1989), which held that the New York Superintendent of Insurance, suing as liquidator of an insurance company, failed to state a claim under federal RICO by alleging as the sole predicate acts the mailing of false financial statements by officers of the insurance company to the *New York Department of Insurance*, because that entity was not deprived of any property interest in reliance on the false statements. Corcoran, 886 F.2d at 19-22.

The reason the Corcoran complaint was dismissed was that the alleged predicate acts did not constitute federal mail fraud because the "person" alleged to have been deceived (the Superintendent of Insurance) did not thereby lose money or property. Consequently, the court concluded that the filing of false financial statements with the New York Insurance Department -- the only mailing alleged in Corcoran -- did not meet the technical definition of "mail fraud" contained in 18 U.S.C. §1341, because the Department did not thereby lose property or money.

Similarly, other cases upon which Martin relies in support of his position here also are inapposite. Both Brandenburg v. Seidel, 859 F.2d 1179 (4th Cir. 1988), and Mid Atlantic Telecom v. Long Distance Services, 18 F.3d 260 (4th Cir.), cert. denied, _ U.S. _ , 115 S. Ct. 323 (1994), were concerned with proximate causation between alleged predicate acts of mail fraud and the victims' injuries.

Twentieth Century, through its liquidator Long, points out that its case against Martin is entirely different from those rejected in both Corcoran and Brandenburg. First, the claims in this case are brought pursuant North Carolina RICO law, not federal RICO. North Carolina law does not permit acts of mail fraud to stand alone as the "predicate act" allowing a scheme to be classified as "a pattern of racketeering" in a private civil action. Rather, North Carolina RICO requires that a private plaintiff allege the existence of at least one "act of racketeering" other than mail fraud. See N.C. Gen. Stat. 5 75D8(c). The allegations advanced by the plaintiff in Counts I and II of the Complaint herein comply with this requirement.

Secondly, Corcoran dealt with facts where no indictable federal mail fraud offense was pled. In contrast, not only has Commissioner Long pled actionable mail fraud, but Martin has been indicted and convicted of multiple counts of federal mail fraud in connection with his dealings with Twentieth Century and its policyholders.

Third, Commissioner Long alleged mail fraud in the Complaint, not by reference to any fraud on the North Carolina Department of Insurance, but by reference to a fraud on Twentieth Century and its policyholders, by specific reference to mailings to those policyholders. The plaintiff herein did not allege that any acts of federal mail fraud consisted of mailings to the Insurance Department -- the fatal error in Corcoran. Rather he alleged that false financial statements -- delivered by private carrier rather than through the mails -- filed with the Insurance Department violated North Carolina criminal laws relating specifically to the filing of false financial statements. These specific North Carolina statutes are included in the definition of "acts of racketeering" in the state RICO statutes. N.C. Gen. Stat. § 75D-3.

Fourth, mail fraud is only one of the many offenses of which Martin was convicted, and is only one of the crimes which the plaintiff alleges Martin committed. The predicate acts alleged in the Complaint include embezzlement and other North Carolina state law crimes designated as predicate acts under the North Carolina RICO statutes. Martin was convicted of crimes in addition to mail fraud, including money laundering and money structuring, as part of his scheme to defraud Twentieth Century and its policyholders. Even absent the mail fraud counts, Martin's multiple convictions of money laundering are sufficient standing alone to establish a "pattern of racketeering" under North Carolina RICO. N.C. Gen. Stat. §§ 75D-B(e), -3(c).

Martin mistakenly believes that an element of a North Carolina RICO claim is proof that a "plaintiff . . .detrimentally relied on a predicate act of racketeering activity." Martin's Memorandum at 4. Rather, the elements of such a claim are set forth in N.C. Gen. Stat. § 75D-B(c), and include proof by a plaintiff "that he has been injured or damaged in his business or property by reason of any violation of G.S. 75D-4 involving a pattern of racketeering activity.....

Martin advances the disingenuous argument that Insurance Commissioner Long did not allege that he had detrimentally relied on anything Martin did. He carries this premise into an argument that Commissioner Long did not allege that he suffered any injury as a proximate cause of Martin's alleged acts, or that Commissioner Long is an "innocent person." In short, the cornerstone of Martin's position is that James E. Long lacks standing to sue him for RICO violations.

It is elementary that the plaintiff in this case is Twentieth Century Life Insurance Company, whose rights are being asserted by its statutory receiver, James E. Long, North Carolina Insurance Commissioner, pursuant to his specific authority under N.C. Gen. Stat. 5 58-30-120(12). The Complaint alleges that Twentieth Century was injured as a result of Martin's racketeering activity:

> 43. By reason of the foregoing acts of [Martin] and his co-conspirators, Twentieth Century has been damaged in that more than $9,800,000 of its assets have been looted from the company and are not available for use in paying claims against the company.

Complaint at ¶ 43. As the plaintiff points out, Martin is confusing Long's role as regulator with that of liquidator of Twentieth Century. The Commissioner "assumes the identity" of an insolvent insurer when he becomes a receiver. North Carolina ex rel. Long v. Alexander & Alexander Services, Inc., 711 F. Supp. at 262.

The plaintiff has not alleged fraud against the North Carolina Department of Insurance as a basis for its private RICO civil action. Plaintiff has alleged a fraud on a North Carolina insurance company -- Twentieth Century -- driving it into insolvency, accompanied by numerous criminal acts, including fraud on regulators necessary to carry out the principal fraud, which acts are not random or isolated in nature, but of a similar nature and part of a pattern. The Complaint alleges that Martin embezzled money from Twentieth Century which he obtained through mail fraud. It alleges that Martin's fraudulent mailings deceived people into sending money to Twentieth Century, which Martin intended to divert to his own use thus injuring the company by increasing its obligations without providing the

assets to cover these obligations. The Complaint further alleges that Martin concealed his crime in order to allow him to steal more money by sending false statements to insurance departments, thus committing federal mail fraud offenses. Cf. United States v. Cosentino, 869 F.2d 301, 308 (7th Cir.) (evidence in federal criminal mail fraud of "deliberate attempts to cover up the transactions to keep the Department of Insurance from shutting down business that was operating outside of the limits. . . ."), cert. denied, 492 U.S. 908 (1989). Finally, the Complaint contends that direct injury to Twentieth Century was reasonably foreseeable as a result of Martin's actions, and that those actions were the direct and proximate cause of Twentieth Century's injuries.

Martin has failed to demonstrate that he is entitled to judgment on the pleadings. Nor has he demonstrated that he is entitled to summary judgment as to Counts I and II. Rule 56, Fed. R. Civ. P. His arguments are misdirected and his premises flawed. For the reasons set forth herein, Martin's Motion for Judgment on the Pleadings or for Summary Judgment is DENIED.

1. Plaintiff's motion for Partial Summary Judgment as to defendants Hevey and Cooper on the fraud claim -- Count III in No. 92-783 -- is ALLOWED. Plaintiff is entitled to partial summary judgment as against each of defendants Hevey and Cooper in the principal amount of $9,085,425.67, jointly and severally.

2. Motions to File Amended Answer and to Add Counterclaim in No. 94-850, and to Extend Discovery are DENIED.

3. Martin's Motion for Judgment on the Pleadings or for Summary Judgment on Counts I and II -- North Carolina RICO violations -- in No. 94-850 is DENIED.

SO ORDERED.

This 16th day of January, 1996.

/s/ James C. Fox
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA,
WESTERN DIVISION

STATE OF NORTH CAROLINA,
on relation of James E. Long,
Commissioner of Insurance,
as Liquidator of Twentieth Century
Life Insurance Company,

Plaintiff,

v.

GLENN H. MARTIN,
CANDACE L. COOPER,
LOUIS J. HEVEY,

Defendants.

No. 92-CV-783-5-F

Entered: November 2, 1995

ORDER

It is hereby ORDERED that future pleadings and orders shall be filed by the Clerk of Court only in case number 5:94-CV850-F2, but shall carry the captions and case numbers of both these consolidated cases, and be deemed as having been filed separately in each case.

SO ORDERED.

This 2nd of November, 1995.

/s/ James C. Fox

United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA,
WESTERN DIVISION

STATE OF NORTH CAROLINA,
on relation of James E. Long,
Commissioner of Insurance,
as Liquidator of Twentieth Century
Life Insurance Company,

Plaintiff,

v.

GLENN H. MARTIN,
CANDACE L. COOPER,
LOUIS J. HEVEY,

Defendants.

No. 92-CV-783-5-D
No. 5-94-CV-850-F2

Entered: November 13, 1995

DEFENDANT'S MOTION TO ANSWER TO COMPLAINT, ADD AFFIRMATIVE DEFENSES AND COUNTER-CLAIM

COMES NOW, Glenn H. Martin, by and through his undersigned attorney, pursuant to Rule 15 Federal Rules of Civil Procedure and files this Motion to Amend his Answer To Complaint, Add Affirmative Defenses And Counter-Claim, and would show as follows:

1. The subject complaint was filed and properly served on the Defendant's [sic] in December of 1994.

2. The Defendant timely filed his response.

3. This Court granted Defendant's Motion to Stay these Proceedings on or about January 26, 1995, because the defendant was involved in a parallel criminal proceeding in the Federal District Court for the Middle District of Florida.

4. In the answer to the subject complaint, the Defendant asserted his Fifth Amendment privilege against sell incrimination to at relevant portions thereof.

5. The Federal criminal case concluded in August of 1995 and there will no longer be any reason to invoke the constitutional privilege once the Defendant is sentenced on or about November 9, 1995.

6. The Defendant therefore would like to respond to the factual allegations, assert any affirmative defense that he is entitled to, and bring a counter-claim as soon as the sentencing phase of his criminal case is concluded. Currently, as mentioned above, the sentencing is scheduled for November 9, 1995, at 8:30 a.m. However, the U.S. Government has made a motion to continue the sentencing hearing to another date which is believed to be November 27, 1995.

7. The Defendant would request that he be allowed to file his amended pleadings (10) ten days after the granting of this motion or ten days after the sentencing hearing, which ever is later.

Wherefore, Defendant, Glenn H. Martin, respectively request an order granting his motion to amend the answer to the complaint consistent with paragraph (7) seven above and any other relief in law or equity that is deemed proper.

This 13 day of November, 1995.

/s/ Mark G. Jochem
/s/ Rebecca Sillmon

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA,
RALEIGH DIVISION

State of North Carolina on the Relation of
James E. Long, Commissioner of Insurance,
as Liquidator of Twentieth Century Life
Insurance Company,

Plaintiff,

v.

Candace L. Cooper,
Louis H. Hevey and
Talena Moegerle,

Defendants.

Entered: October 10, 1995

No. 92-783-CIV-5-D

MOTION FOR AN ORDER PERMITTING
SUPPLEMENTATION OF DEFENDANT COOPER'S ANSWER

NOW COMES Defendant Candace L. Cooper (hereinafter "Cooper"), by and through the undersigned attorney, pursuant to an Order issued on September 25,1995 by this Court and seeks by this motion an order which would permit supplementation of her Answer to Plaintiff's Complaint. In support thereof, Defendant Cooper shows unto the Court the following:

1. This action was commenced in the state court of North Carolina on October 21, 1992 and subsequently removed from the state court to the United States District Court, Eastern District of North Carolina.

2. Defendants Hevey and Cooper jointly filed a motion to stay these proceedings and for a protective order staying all further discovery on September 3, 1993 in light of the an ongoing criminal investigation into the subject matter of the present case in the state of Florida.

3. Said motion was denied in an Order issued by Magistrate Judge Denson on April 7, 1994.

4. Defendant Cooper filed her Answer on May 2, 1994 and asserted her Fifth Amendment privilege in response to virtually all of the allegations of the complaint.

5. Defendants Hevey and Cooper appealed Magistrate Judge Denson's Order; however, it was affirmed by Order of Judge Dupree issued August 12, 1994.

6. On November 10, 1994, Defendant Cooper was indicted in the Middle District of Florida (United States v. Martin, No. 94-155-CR-ORL-19) on charges related to the subject matter of the present case.

7. Defendant Cooper's Florida attorney filed a letter with this Court on January 19, 1995 which was effectively a motion to stay these proceedings pending the outcome of the criminal case in Florida,

8. On February 10, 1995, Judge Dupree issued an Order continuing the trial in the present matter and staving all proceedings pending the completion of the criminal proceedings in Florida.

9. The jury returned its verdict in the criminal trial in Florida on August 15, 1995, and Defendant Cooper is scheduled for sentencing on November 9, 1995.

10. A telephonic conference regarding the status of this case was held September 25, 1995, and an Order was issued pursuant to said conference permitting Defendant Cooper to file a motion regarding the supplementation of her Answer to the Plaintiffs Complaint.

WHEREFORE Defendant Cooper wishes to waive her Fifth Amendment rights and prays this Court for an order permitting supplementation of her Answer dated May 2, 1994 to the allegations contained in the Plaintiff s Complaint.

Respectfully submitted this the 10th day of October, 1995.

Allen and Pinnix, P.A.
by /s/ Noel L. Allen
State Bar No. 5485
Attorney for Defendant Cooper
P.O. Drawer 1270
Raleigh, North Carolina 27602
(919)755-0505

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
92-783-CIV-5-D

STATE OF NORTH CAROLINA on the relation of JAMES E. LONG, Commissioner of Insurance, as Liquidator of TWENTIETH CENTURY LIFE INSURANCE COMPANY,

Plaintiff,

v.

CANDACE L. COOPER, LOUIS H. REVEY and TALENA MOEGERLE,

Defendants.

Entered: February 3, 1993

AFFIDAVIT OF MELVIN J. DILLON

Melvin J. Dillon, being first duly sworn, deposes and says:

1. My name if Melvin J. Dillon. I am a resident of Wake County, North Carolina, and I have personal knowledge of the facts set out in this Affidavit.

2. I am the President of M. J. Dillon company, Inc., a Raleigh insurance consulting firm. I established M. J. Dillon Company in 1955 following my retirement as the president of State Capital Insurance Company, a Raleigh-based, North Carolina property and casualty insurer. Before my retirement from State Capital I had over thirty (30) years of experience in the insurance industry including experience as the chairman of the North Carolina Insurance Guaranty Association and as a member of various committees of the North Carolina Rate Bureau.

3. Beginning in 1985 I have served as a Special Deputy Commissioner of Insurance to North Carolina Insurance Commissioner James E. Long in connection with delinquency proceedings instituted against insolvent North Carolina insurers, including Twentieth Century Life Insurance Company, the

Beacon Insurance Company and Northwestern Security Life insurance Company.

4. At the request of Commissioner Long and his deputies I have provided consulting services with respect to Twentieth Century Life Insurance Company, a North Carolina corporation, since 1989. Since Twentieth Century was placed in delinquency proceedings in March, 1991, I have participated in managing the affairs of Twentieth Century.

5. While serving as a consultant for the North Carolina Insurance Department I became familiar with Mr. Louis Hevey, who was the treasurer of Twentieth Century Life Insurance Company. To my knowledge Mr. Hevey was responsible for seeing that all of the financial records of Twentieth Century were properly maintained.

6. On July 17, 1991, I attended a meeting held in the offices of an attorney in Winter Park, Florida. The meeting was held at the request of Mr. Louis Hevey which was relayed through an examiner employed by the North Carolina Department of Insurance. Present at the meeting were Mr. Hevey, Mr. Alex Spencer, Senior Deputy Commissioner of Insurance of the State of North Carolina, a North Carolina attorney representing the Commissioner, myself, and for a limited time, a Florida attorney.

7. At the meeting Mr. Louis Hevey brought with him handwritten documentation of various bank accounts which had been set up in the name of Twentieth Century Life Insurance Company but which had not been included in the financial records of the company turned over to Commissioner Long's representatives nor had North Carolina Insurance Department personnel previously been notified of the existence of these records.

8. The records supplied by Mr. Hevey were reviewed and discussed during the course of the meeting. Mr. Hevey stated that Mr. Glenn H. Martin, the President of Twentieth Century Life Insurance Company, had instructed Mr. Hevey to handle the accounts, off of the books, in order to hide the money and that Mr. Martin had given Mr. Hevey instructions for the various checks that were issued from the accounts.

9. The accounts, according to Mr. Hevey, were set up at the time that Twentieth Century Life Insurance Company had been ordered to discontinue writing business, and they were funded by

premiums received from policies written by agents for Twentieth Century Life Insurance Company. The premiums deposited into the accounts were not booked on Twentieth Century's financial records and were not deposited into the normal Twentieth Century bank accounts, but were deposited directly into the bank accounts identified by him and used for various activities of Mr. Martin. The policies issued with respect to such premiums also were held off of the books and records of Twentieth Century Life Insurance Company, according to Mr. Hevey.

10. Mr. Hevey stated that the amount of premiums held off the general ledger of Twentieth Century and deposited into the hidden accounts amounted to approximately $9.5 million, with about one-third being disbursed to Mr. Martin, one-third to Financial Security Corporation of America, the managing general agency for Twentieth Century, and the remaining one-third used to pay off shareholders' capital contributions.

11. According to Mr. Hevey, Ms. Candace Cooper, vice-president of Twentieth Century Life Insurance Company, had complete knowledge of all transactions and the way in which the policies and premiums were handled in order to keep them hidden. According to Mr. Hevey, Mrs. Lou Ann Foulkes, a vice-president of Twentieth Century Life Insurance Company, was aware and participated.

12. Mr. Hevey stated that he realized that handling the premiums and accounts in the matter he had discussed was improper and he expressed a desire to cooperate with the North Carolina Department of Insurance in the matter.

13. During the meeting with Mr. Hevey no one present compelled him to make any statement and no one offered him any immunity.

14. This is the end of the affidavit.

This the 8th day of February, 1993.

/s/ Melvin J. Dillon

[Jurat omitted]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA,
ORLANDO DIVISION

United States Of America

v.

Glenn H. Martin

Case No, 94-155-Cr-Orl-19

Entered: August 15, 1995

VERDICT

Count One of the Indictment

1. As to the offense of conspiracy to commit mail fraud, We, the Jury, find the defendant, GLENN H. MARTIN: Guilty

2. As to the offense of conspiracy to conduct financial transactions with the intent to promote mail fraud, We the Jury, find the defendant, GLENN H. MARTIN: Guilty

3 As to the offense of conspiracy to conduct financial transactions with the intent to conceal or disguise the proceeds of mail fraud, We, the Jury, find the defendant, GLENN H. MARTIN: Guilty

4. As to the offense of conspiracy to engage in monetary transactions in criminally derived property, We, the Jury, find the defendant, GLENN H. MARTIN: Guilty

Count Two of the Indictment

5. As to the offense of mail fraud, We, the Jury, find the defendant, GLENN H. MARTIN: Not Guilty

Count Three of the Indictment

6. As to the offense of mail fraud, We, the Jury, find the defendant, GLENN H. MARTIN: Guilty

Count Four of the Indictment

7. As to the offense of mail fraud, We Jury, find the defendant, GLENN H. MARTIN: Guilty

Count Five of the Indictment

8. As to the offense of mail fraud, We, the Jury, find the defendant, GLENN H. MARTIN: Not Guilty

Count Six of the Indictment

9. As to the offense of mail fraud, We, the Jury, find the defendant, GLENN H. MARTIN: Not Guilty

Count Seven of the Indictment

10. As to the offense of mail fraud, We, the Jury, find the defendant, GLENN H. MARTIN: Not Guilty

Count Eight of the Indictment

11. As to the offense of mail fraud, We, the Jury, find the defendant GLENN H. MARTIN: Not Guilty

Count Nine of the Indictment

12. As to the offense of mail fraud, We, the Jury, find the defendant, GLENN H. MARTIN: Guilty

Count Ten of the Indictment

13. As to the offense of mail fraud, We, the Jury, find the defendant, GLENN H. MARTIN: Not Guilty

Count Eleven of the Indictment

14. As to the offense of mail fraud, We, the Jury, find the defendant, GLENN H. MARTIN: Not Guilty

Count Twelve of the Indictment

15. As to the offense of mail fraud, We, the Jury, find the defendant, GLENN H. MARTIN: Not Guilty

Count Thirteen of the Indictment

16. As to the offense of mail fraud, We, the Jury, find the defendant, GLENN H. MARTIN: Not Guilty

Count Fourteen of the Indictment

17. As to the offense of mail fraud, We, the Jury, find the defendant, GLENN H. MARTIN: Not Guilty

Count Fifteen of the Indictment

18. As to the offense of mail fraud, We, the Jury, find the defendant, GLENN H. MARTIN: Guilty

Count Sixteen of the Indictment

19. As to the offense of mail fraud, We, the Jury, find the defendant, GLENN H. MARTIN: Guilty

Count Seventeen of the Indictment

20. As to the offense of mail fraud, We, the Jury, find the defendant, GLENN H. MARTIN: Not Guilty

Count Eighteen of the Indictment

21. As to the offense of mail fraud, We, the Jury, find the defendant, GLENN H. MARTIN: Guilty

Count Nineteen of the Indictment

22. As to the offense of engaging in a monetary transaction in criminally derived property, We, the Jury, find the defendant, GLENN H. MARTIN: Guilty

Count Twenty of the Indictment

23. As to the offense of engaging in a monetary transaction in criminally derived property, We, the Jury, find the defendant, GLENN H. MARTIN: Guilty

Count Twenty-One of the Indictment

24. As to the offense of engaging in a monetary transaction in criminally derived property, We, the Jury, find the defendant, GLENN H. MARTIN: Guilty

Count Twenty-Two of the Indictment

25. As to the offense of engaging in a monetary transaction in criminally derived property, We, the Jury, find the defendant, GLENN H. MARTIN: Guilty

Count Twenty-Three of the Indictment

26. As to the offense of engaging in a monetary transaction in criminally derived property, We, the Jury, find the defendant, GLENN H. MARTIN: Guilty

Count Twenty-Four of the Indictment

27. As to the offense of engaging in a monetary transaction in criminally derived property, We, the Jury, find the defendant, GLENN H. MARTIN: Guilty

Count Twenty-Five of the Indictment

28. As to the offense of engaging in a monetary transaction in criminally derived property, We, the Jury, find the defendant, GLENN H. MARTIN: Guilty

Count Twenty-Six of the Indictment

29. As to the offense of conducting a financial transaction with the intent to promote mail fraud, We, the Jury, find the defendant, GLENN H. MARTIN: Guilty

Count Twenty-Seven of the Indictment

30. As to the offense of conducting a financial transaction with the intent to promote mail fraud, We, the Jury, find the defendant, GLENN H. MARTIN: Guilty

Count Twenty-Eight of the Indictment

31. As to the offense of conducting a financial transaction with the intent to promote mail fraud, We, the Jury, find the defendant, GLENN H. MARTIN: Guilty

Count Twenty-Nine of the Indictment

32. As to the offense of conducting a financial transaction with the intent to conceal or disguise the proceeds of mail fraud, We, the Jury, find the defendant, GLENN H. MARTIN: Guilty

Count Thirty of the Indictment

33. As to the offense of conducting a financial transaction with the intent to conceal or disguise the proceeds of mail fraud, We, the Jury, find the defendant, GLENN H. MARTIN: Guilty

Count Thirty-One of the Indictment

34. As to the offense of conducting a financial transaction with the intent to conceal or disguise the proceeds of mail fraud, We, the Jury, find the defendant, GLENN H. MARTIN: Guilty

Count Thirty-Two of the Indictment

35. As to the offense of conducting a financial transaction with the intent to conceal or disguise the proceeds of mail fraud, We, the Jury, find the defendant, GLENN H. MARTIN: Guilty

Count Thirty-Three of the Indictment

36. As to the offense of conducting a financial transaction with the intent to conceal or disguise the proceeds of mail fraud, We, the Jury, find the defendant, GLENN H. MARTIN: Guilty

SO SAY WE ALL this 15th day of August, 1995.

/s/ Foreman

[Certification of copy by Clerk omitted]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA,
ORLANDO DIVISION

United States of America

v.

Candace L. Cooper

Case No. 94-155-Cr-Orl-19

VERDICT

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1. As to the offense of conspiracy to commit mail fraud, We, the Jury, find the defendant, CANDACE L. COOPER: Guilty

2. As to the offense of conspiracy to conduct financial transactions with the intent to promote mail fraud, We, the Jury, find the defendant, CANDACE L. COOPER: Not Guilty

3. As to the offense of conspiracy to conduct financial transactions with the intent to conceal or disguise the proceeds of mail fraud, We, the Jury, find the defendant, CANDACE L. COOPER: Not Guilty

4. As to the offense of conspiracy to engage in monetary transactions in criminally derived property, We, the Jury, find the defendant, CANDACE L. COOPER: Not Guilty

Count Two of the Indictment

5. As to the offense of mail fraud, We, the Jury, find the defendant, CANDACE L. COOPER: Not Guilty

Count Three of the Indictment

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Count Thirty-Three of the Indictment

36. As to the offense of conducting a financial transaction with the intent to conceal or disguise the proceeds of mail fraud, We, the Jury, find the defendant, CANDACE L. COOPER: Not Guilty

SO SAY WE ALL this 15th day of August, 1995.

/s/ Foreman

[Certification of copy by Clerk omitted]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA,
ORLANDO DIVISION

UNITED STATES OF AMERICA

v.

LOUIS J. HEVEY

Case No. 95-69-Cr-Orl-19

PLEA AGREEMENT

A. Particularized Terms

Pursuant to Fed. R. Crim. P. 11(e), the United States of America, by Charles R. Wilson, United States Attorney for the Middle District of Florida, and the defendant, LOUIS J. HEVEY, and the attorney for the defendant, Manuel Socias, mutually agree as follows:

1. Count Pleading To

The defendant shall enter a plea of guilty to Count One of an Information, which charges the defendant with conspiracy to commit mail fraud and structuring transactions for the purpose of avoiding currency transaction reporting requirements, in violation of Title 18, United States Code, Section 371.

2. Maximum Penalties

Count One carries a maximum sentence of five years, a fine of $250,000, a term of supervised release of three years and a special assessment of $50, said special assessment to be due on the date of sentencing. When applicable, the Court may also order the defendant to make restitution to any victim of the offense, as set forth below.

3. Elements of the Offense

The defendant acknowledges understanding the nature and elements of the offense with which defendant has been charged and to which defendant is pleading guilty. The elements of Count One are:

First: That two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment;

Second: That the Defendant willfully became a member of such conspiracy;

Third: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the methods (or "overt acts") described in the indictment; and

Fourth: That such "overt act" was knowingly committed at or about the time alleged in an effort to carry out or accomplish some object of the conspiracy.

4. Indictment Waiver

Defendant will waive the right to be charged by way of indictment before a federal grand jury.

5. Adjusted Offense Level

Pursuant to Fed. R. Crim, P, 11(e)(1)(B), the government will recommend to the Court that the defendant's adjusted offense level be calculated as follows pursuant to U.S.S.G.:

Mail Fraud Conspiracy Guidelines

2F 1. I (a)	Base level	6
2F I - I (b)(1)(D)	More than $5,000,000 loss	14
2F 1. 1 (b) (2)	More than minimal planning	2
2F- I - I (b)(3)(B)	Violation of judicial order	2
Total:		24

Structuring Conspiracy Guidelines

2Sl.3(a)	Base offense level	6
2F 1. I (b) (1) (I)	More than $200,000	8
2SI.3(b)(1)	Defendant knew funds were proceeds of unlawful activity or ntended to promote illegal activity	2
	Total	16

The parties would further recommend to the Court that, pursuant to Section 3D1.2(b), the mail fraud and conspiracy guidelines be grouped together in a single Group, and that, pursuant to Section 3D1-3(a), the higher offense level of 24, be used as the appropriate offense level. The defendant understands that this recommendation or request is not binding on the Court, and if not accepted by the Court the defendant will not be allowed to withdraw from the plea.

6. Acceptance of Responsibility

At the time of sentencing, and in the event that no adverse information is received suggesting such a recommendation to be unwarranted, the United States will recommend to the Court that the defendant receive a three level downward adjustment for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1. The defendant understands that this recommendation or request is not binding on the Court, and if not accepted by the Court the defendant will not be allowed to withdraw from the plea.

7. Low End

At the time of sentencing, and in the event that no adverse information is received suggesting such a recommendation to be unwarranted, the United States will recommend to the Court that the defendant receive a sentence at the low end of the applicable guideline range, as calculated by the Court. The defendant understands that this recommendation or request is not binding on

the Court, and if not accepted by the Court the defendant will not be allowed to withdraw from the plea.

8. Substantial Assistance

Defendant agrees to cooperate fully with the United States in the investigation and prosecution of other persons, and to testify, subject to a prosecution for perjury or making a false statement, fully and truthfully before any federal court proceeding or federal grand jury in connection with the charges in this case and other matters, such cooperation to further include a full and complete disclosure of all relevant information, including production of any and all books, papers, documents and other objects in defendant's possession or control, and to be reasonably available for interviews which the United States may require. If the cooperation is completed prior to sentencing, the government agrees to consider whether such cooperation qualifies as "substantial assistance" pursuant to 18 U.S.C. § 3553(e), U.S.S.G. § 5K1.1, and the policy of the United States Attorney for the Middle District of Florida, warranting the filing of a motion at the time of sentencing, recommending a downward departure from the applicable guideline range. If the cooperation is completed subsequent to sentencing, the government agrees to consider whether such cooperation qualifies as "substantial assistance" pursuant to Fed. R. Crim. P. 35(b), and the policy of the United States Attorney for the Middle District of

Florida, warranting the filing of a motion for a reduction of sentence within one year of the imposition of sentence. In either case, the defendant understands that the determination as to whether "substantial assistance" has been provided rests solely with the government, and the defendant agrees that defendant cannot and will not challenge that decision, whether by appeal, collateral attack or otherwise.

9. Section 1B1.8

Pursuant to U.S.S.G. § 1B1.8(a), the United States agrees that no self-incriminating information which the defendant may provide during the course of defendant's cooperation shall be used

in determining the applicable sentencing guideline range, subject to the restrictions and limitations set forth in U.S.S.G. § 1B1.8(b).

10. Cooperation

The defendant agrees to cooperate fully with the United States in the investigation and prosecution of other persons, and to testify fully and truthfully before any and all federal grand juries and at any trials or other proceedings in connection with any of the cases, charges or matters noted herein, and any related cases. The defendant further agrees to be reasonably available for all interviews which the United States may require. The defendant further agrees to make full and complete disclosure of all relevant information, including production of any and all books, papers, documents and other objects in the defendant's possession and control.

11. Cooperation - Responsibilities of Parties

a. The government will make known to the Court and other relevant authorities the nature and extent of defendant's cooperation and any other mitigating circumstances indicative of the defendant's rehabilitative intent by assuming the fundamental civic duty of reporting crime. However, the defendant understands that the government can make no representation that the Court will impose a lesser sentence solely on account of, or in consideration of, such cooperation.

b. It is understood that should the defendant knowingly provide incomplete or untruthful testimony, statements or information pursuant to this agreement, or should the defendant falsely implicate or incriminate any person, or should the defendant fail to voluntarily and unreservedly disclose and provide full, complete, truthful and honest knowledge, information, and cooperation regarding any of the matters noted herein, the following conditions shall apply:

1) The defendant may be prosecuted for any perjury or false declarations, if any, committed while testifying pursuant to this agreement, or for obstruction of justice.

2) The United States may prosecute the defendant for the charges which are to be dismissed pursuant to this agreement, if any, and may either seek reinstatement of or refile such charges and prosecute the defendant thereon in the event such charges have been dismissed pursuant to this agreement. With regard to such charges, if any, which have began dismissed, the defendant, being fully aware of the nature of all such charges now pending in the instant case, and being further aware of defendant's rights, as to all felony charges pending in such cases (those offenses punishable by imprisonment for a term of over one year), to not be held to answer to said felony charges unless on a presentment or indictment of a grand jury, and further being aware that all such felony charges in the instant case have heretofore properly been returned by the indictment of a grand jury, does hereby agree to reinstatement of such charges by recision of any order dismissing them or, alternatively, does hereby waive, in open court, prosecution by indictment and consents that the United States may proceed by information instead of by indictment with regard to any felony charges which may be dismissed in the instant case, pursuant to this plea agreement, and the defendant further agrees to waive the statute of limitations and any speedy trial claims on such charges.

3) The United States may prosecute the defendant for any offenses set forth herein, if any, the prosecution of which in accordance with this agreement, the United States agrees to forego, and the defendant agrees to waive the statute of limitations and any speedy trial claims as to any such offenses.

4). The government may use against the defendant his own admissions and statements and the information and bocks, papers, documents and objects that he himself has furnished in the course of his co-operation with the government.

5) The defendant will not be permitted to withdraw the guilty plea to those counts to which defendant hereby agrees to plead in the instant case, but in that event defendant will be entitled to the sentencing limitations, if any, set forth in this plea agreement, with regard to those counts to which the defendant has pled; or in the alternative, at the option of the United States, the United States may move the Court to declare this entire plea agreement null and void.

B. Standard Terms and Conditions

1. Restitution. Special Assessment and Fine

The defendant understands and agrees that the Court may also, in addition to or in lieu of any other penalty, order the defendant to make restitution to any victim of the offense(s), pursuant to 18 U.S.C. § 3663 (offenses committed on or after 11/1/87) or section 3579, including restitution as to all counts charged, whether or not the defendant enters a plea of guilty to such counts, and whether or not such counts are dismissed pursuant to this agreement. On each count to which a plea of guilty is entered, the Court shall impose a special assessment, to be payable to the Clerk's Office, United States District Court, and due on date of sentencing. The defendant understands that this agreement imposes no limitation as to fine.

2. Supervised Release

The defendant understands that the offense to which the defendant is pleading provides for imposition of a term of supervised release upon release from imprisonment, and that, if the defendant should violate the conditions of release, the defendant would be subject to a further term of imprisonment.

3. Sentencing Information

The United States reserves its right and obligation to report to the Court and the United States Probation Office all information concerning the background, character and conduct of the defendant, to provide relevant factual information, including the totality of the defendant's criminal activities, if any, not limited to the count(s) to which defendant pleads, to respond to comments made by the defendant or defendant's counsel and to correct ally misstatements, or inaccuracies. The United States further reserves its right to make any recommendations it deems appropriate regarding the disposition of this case, subject to any limitations set forth herein, if any.

The defendant agrees, and by the execution of this plea agreement, authorizes the United States Attorney's Office to

provide to and obtain from the United States Probation Office or any victim named in an order of restitution, or any other source, any of the defendant's federal, state and local tax returns, bank records and any other financial information concerning the defendant, for the purpose of making any recommendations to the Court and for collecting any assessments, fines, restitution or forfeiture ordered by the Court.

4. Sentencing Guidelines and Recommendations

It is understood by the parties that the Court is neither a party to nor bound by this agreement. The Court may accept or reject the agreement, or defer a decision until it has had an opportunity to consider the presentence report prepared by the United States Probation Office. The defendant understands and acknowledges that, although the parties are permitted to make recommendations and present arguments to the Court, the sentence and the sentencing guidelines, if any, applicable to defendant's case will be determined solely by the Court, with the assistance of the United States Probation Office. Defendant understands that the Court is required to consider any applicable sentencing guidelines but may depart from these guidelines under some circumstances. Defendant acknowledges that defendant and defendant's attorney have discussed the sentencing guidelines and defendant understands how the guidelines are applicable to defendant's case. Defendant further understands and acknowledges that any discussions between defendant or defendant's attorney and the attorney or other agents for the government regarding the potential application of the sentencing guidelines to defendant's case and any recommendations by the government are not binding on the United States Probation Office or the Court and that, should any recommendations be rejected, and regardless of the guidelines calculated by the Probation Office or the Court, defendant will not be permitted to withdraw defendant's plea pursuant to this Plea Agreement. The government expressly reserves the night to support and defend any decision that the Court may make with regard to the defendant's sentence, whether or not such decision is consistent with the government's recommendations contained herein.

5. Appeal of Sentence; Waiver

The defendant understands and acknowledges that defendant's sentence will be determined and imposed in conformance with the Comprehensive Crime Control Act of 1994, and the federal sentencing guidelines. Defendant is also aware that a sentence imposed under the sentencing guidelines does not provide for parole. Knowing these facts, the defendant agrees that this Court has jurisdiction and authority to impose any sentence tip to the statutory maximum set forth for the offense, and pursuant to the sentencing guidelines, and expressly waives the right to appeal defendant's sentence, directly or collaterally, on any ground except for an upward departure by the sentencing judge or a sentence above the statutory maximum or a sentence in violation of the law apart from the sentencing guidelines; provided, however, that if the government exercises its right to appeal the sentence imposed, as authorized by 18 U.S.C. § 3742(b), the defendant is released from this waiver and may appeal the sentence as authorized by 18 U.S.C. § 3742(a).

6. Middle District of Florida Agreement

It is further understood that this agreement is limited to the Office of the United States Attorney for the Middle District of Florida and cannot bind other federal or local prosecuting authorities, although this Office will bring defendant's cooperation, if any, to the attention of other prosecuting officers or others, if requested.

7. Filing of Agreement

This agreement shall be presented to the Court, in open court or in camera, in whole or in part, upon a showing of good cause, and filed in this cause, at the time of defendant's entry of a plea of guilty pursuant hereto.

8. Voluntariness

The defendant acknowledges that defendant is entering into this agreement and is pleading guilty freely and voluntarily without

reliance upon any discussions between the attorney for the government and the defendant and defendant's attorney and without promise of benefit of any kind (other than the concessions contained herein), and without threats, force, intimidation or coercion of any kind. The defendant further acknowledges defendant's understanding, of the nature of the offense or offenses to which defendant is pleading guilty, and the elements thereof, including, the penalties provided by law, and defendant's complete satisfaction with the representation and advice received from defendant's undersigned counsel (if any). The defendant also understands that defendant has the right to plead not guilty or to persist in that plea if it has already been made, and that defendant has the right to be tried by a jury with the assistance of counsel, the right to confront and cross-examine the witnesses against defendant, the right against compulsory self-incrimination and the right to compulsory process for the attendance of witnesses to testify in defendant's defense; but by pleading guilty defendant waives or gives up those rights and there will be no trial. The defendant further understands that if defendant pleads guilty, the Court may ask defendant questions about the offense or offenses to which defendant pleaded, and if defendant answers those questions under oath, on the record, and in the presence of counsel (if any), defendant's answers may later be used against defendant in a prosecution for perjury or false statement. The defendant also understands that defendant will be adjudicated guilty of the offenses to which defendant has pleaded and, if any of such offenses are felonies, may thereby be deprived of certain rights, such as the right to vote, to hold public office, to serve on a jury, or to have possession of firearms.

9. Factual Basis

Defendant is pleading guilty because defendant is in fact guilty. The defendant certifies that defendant does hereby admit that the facts set forth below are true, and were this case to go to trial, the United States would be able to prove those facts beyond a reasonable doubt:

FACTS

1. At all times material herein:

a. Twentieth Century Financial Corporation of America (Twentieth Century Financial Corporation or TCFCA) was incorporated in the state of Florida, and conducted business in North Carolina, Florida, and elsewhere. Glenn H. Martin was the Chief Executive Officer, President, majority stockholder and Chairman of the Board of Directors; Candace L. Cooper was the Corporate Secretary and a member of the Board of Directors; and defendant LOUIS J. HEVEY was the Corporate Treasurer. Twentieth Century Financial Corporation maintained a checking account at Sun Bank, Orlando , Florida.

b. Twentieth Century Life Insurance Company (Twentieth Century Life or TCL), a wholly-owned subsidiary of Twentieth Century Financial Corporation, was incorporated and chartered in the state of North Carolina, and conducted business in North Carolina, Florida, and elsewhere. Glenn H. Martin was the Chief Executive Officer, President, and Chairman of the Board of Directors; Candace L. Cooper was the Corporate Secretary and only other member of the Board of Directors; and defendant LOUIS J. HEVEY was the Corporate Treasurer. Twentieth Century Life maintained corporate checking accounts at Sun Bank, Orlando, Florida.

c. Twentieth Century Life sold various types of insurance policies, including single premium whole life insurance policies, as well as single premium annuities, to its policy holders. These whole life insurance policies and annuities would accumulate cash values which could be redeemed by the policy holder or owner of the insurance policy or annuity (hereinafter policy holders or insured) under certain conditions specified in the life insurance policy or annuity. These policies also required Twentieth Century Life to pay death benefits in the event of death of the insured. Twentieth Century Life was also required by law to set up a reserve fund for these accumulated cash value and death benefits. These reserve funds were required to he held in a trust fund to be expended only for the benefit of policy holders. The ability of Twentieth Century Life to pay its contractual liabilities to policy holders and to hold and maintain the reserve

funds required by law depended upon the financial soundness and liquidity (ability to pay current obligations) of the life insurance company.

d. The primary responsibility to make required payments to policy holders remained at all times with Twentieth Century Life. However, as additional protection for the policy holders of Twentieth Century Life and other life insurance companies, many state legislatures created insurance guaranty associations. Specifically, the states of North Carolina and Florida created by legislation the North Carolina Life, Accident, and Health Insurance Guaranty Association and the Florida Life and Health Insurance Guaranty Association, respectively, both non-profit entities or agencies. Subject to certain restrictions, the North Carolina Life, Accident, and Health Insurance Guaranty Association was required by law to reimburse all policy holders of life insurance companies domiciled within the state of North Carolina in the event of the insolvency or failure of any such life insurance company. Subject to certain restrictions, the Florida Life and Health Insurance Guaranty Association was required by law to reimburse policy holders residing in the state of Florida in the event of the insolvency or failure of a life insurance company licensed to do business within the state of Florida. These guaranty associations were funded through fees assessed all licensed life insurance companies licensed to write business in the respective states.

e. As a condition of receiving a license to conduct business in the states of North Carolina and Florida, and to qualify for the protection of the North Carolina and Florida insurance guaranty associations for its policy holders, life insurance companies doing business in said states were required to submit to regulation by the state of North Carolina, through the North Carolina Department of Insurance, and by the state of Florida, through the Florida Department of Insurance. The North Carolina and Florida insurance guaranty associations relied upon said insurance departments to regulate and periodically audit and monitor the operations of such life insurance companies to determine whether the companies were making approved investments and maintaining proper reserves as required by North Carolina and Florida statutes. These statutes were intended to require insurance companies to maintain prudent investments and

adequate financial reserves so that the insurance company would remain financially solvent and be able to meet their current and long term obligations, so as to insure the integrity of the insurance guaranty funds.

f. Financial Security Corporation of America (FSCA) was incorporated in the state of Florida, did business in North Carolina, Florida, and elsewhere, and marketed Twentieth Century Life Insurance Company products through various insurance agents. Glenn H. Martin was the Chief Executive Officer, Candace L. Cooper was the Vice-President, and defendant LOUIS J. HEVEY was the Chief Financial Officer. FSCA maintained a checking account at Sun Bank, Orlando, Florida.

g. Martin's Home and Hobby House, Inc. (MHH), was incorporated in the state of Florida. Evelyn M. Martin, wife of Glenn H. Martin, was the majority stockholder. MHH maintained checking accounts at Central National Bank (CNB), Winter Park, Florida, and at Sun Bank, Orlando, Florida. Martin's Home and Hobby House, Inc. was a separate entity from Twentieth Century Life.

h. Glenn H. Martin maintained several personal checking accounts, including:

(1) Account number 0411008307 at Bank of Central Florida (BCF), Orlando, Florida in the name of Glenn H. Martin, CLU-CHFC Insurance;

(2) Account number 0215252009243 at Sun Bank, Orlando, Florida in the name of Glenn H. Martin, CLU-CHFC Insurance;

(3) Account number 0776765980542 at Sun Bank, Orlando, Florida in the name of Glenn H. Martin; and

(4) Account number 0871147755 at American Pioneer Savings Bank, Winter Park, Florida (subsequently changed to account number 361-147556 at Southeast Bank, Winter Park, Florida), in the name of Glenn H. Martin/20th Account.

i. From on or about January 1, 1988 until on or about March 31, 1989, Twentieth Century Life advanced approximately $6,300,000 to related companies owned or controlled by Glenn H.

Martin, which companies in turn advanced a substantial portion of such proceeds to the personal use and benefit of Glenn H. Martin.

j. On or about June 8, 1989, and continuing thereafter, due to the concerns of the North Carolina Department of Insurance about financial transactions between Twentieth Century Life and related companies owned or controlled by Glenn H. Martin, and about the solvency and liquidity of Twentieth Century Life, and the soundness of its assets, and to protect the property interests of the Twentieth Century Life policy holders and the North Carolina Life, Accident, and Health Insurance Guaranty Association, the North Carolina Department of Insurance entered into a supervisory agreement with Twentieth Century Life which required Twentieth Century Life to be subject to the direct supervision of the North Carolina Department of Insurance and to abide by certain terms as a condition to being permitted to continue to operate in the life insurance field, including the following terms:

(1) That Twentieth Century Life would not make any withdrawals from any of its bank accounts without the approval of the North Carolina Department of Insurance;

(2) That Twentieth Century Life would not advance, and or invest any of its funds without the approval of the North Carolina Department of Insurance;

(3) That Twentieth Century Life would not enter into any transactions with related parties which transactions the North Carolina Department of Insurance determined to be excessive and not in the ordinary course of business;

(4) That Twentieth Century Life would deposit all receipts to accounts under the name and control of Twentieth Century Life; and

(5) That Twentieth Century Life would make all corporate books and records available to the North Carolina Department of Insurance and Twentieth Century Life would not remove books and records without the approval of the North Carolina Department of Insurance approval.

k. On or about June 16, 1989, due to the concerns of the Florida Department of Insurance about financial transactions between Twentieth Century Life and related companies owned or

controlled by Glenn H. Martin, and about the solvency and liquidity of Twentieth Century Life, and the soundness of its assets, and to protect the property interests of the Twentieth Century Life policy holders and the Florida Life and Health Insurance Guaranty Association, the Florida Department of Insurance issued a Cease and Desist Order prohibiting Twentieth Century Life from writing any new business in the State of Florida.

l. On or about August 1, 1989, the Florida Department of Insurance issued a Consent Order which modified its June 16, 1989, Cease and Desist Order. This Consent Order granted Twentieth Century Life a limited reinstatement of authority to write new business in Florida, subject to several conditions, including the following:

(1) That for every one dollar of Florida gross monthly premiums

from the date of the Consent Order up to and including December 31, 1989 received by Twentieth Century Life, Twentieth Century Life was required to place on deposit an amount equal to one dollar in trust with the Florida Department of Insurance, not to exceed a total of all deposits with the Florida Department of Insurance of $1.45 million;

(2) That Twentieth Century Life was required to limit its gross new Florida business monthly premiums to $200,000 or less for August 1989, and $500,000 or less per month for the period from September 1, 1989, through December 15, 1989, for a total of $2,200,000 or less for August 1, 1989 through December 15, 1989; and

(3) That Twentieth Century Life was not to make any disbursements from its bank accounts without the prior approval of the North Carolina Department of Insurance or Florida Department of Insurance.

m. On or about December 15, 1989, the Florida Department of Insurance extended its August 1, 1989 Consent Order, permitting Twentieth Century Life to continue writing new business, other than annuities, in Florida until March 31, 1990. This extension continued the previous terms of the Order and allowed Twentieth Century Life to continue accepting new

premiums of $500,000 or less per month, for a total of $1,750,000 for the period of December 15, 1989 until March 31, 1990. The new order prohibited Twentieth Century Life from issuing any new annuity policies at all in the state of Florida.

2. From on or about June 8, 1989 until on or about April 14, 1991, in Orange County, Florida, in the Middle District of Florida, in Tallahassee, Florida, in the Northern District of Florida, in Raleigh, North Carolina, and elsewhere, LOUIS J. HEVEY, and others agreed to do and did the following:

a. Glenn H. Martin and Candace L. Cooper would cause to be sold certain Twentieth Century Life single premium life and annuity insurance policies to potential policy holders of Twentieth Century Life, by falsely representing Twentieth Century Life to be a financially sound and solvent life insurance company; by offering to pay interest or dividend rates of 10 to 10-1/2 percent, failing to disclose to said potential policy holders that Twentieth Century Life was not earning sufficient income from its investments to pay the promised interest or dividend rates and that the ability to repay the principal and interest to existing policy holders. Glenn H. Martin intended to intentionally circumvent and disobey the consent decrees and agreements with the North Carolina and Florida Departments of Insurance.

b. the defendant and other co-conspirators, in violation of the restrictions of the consent decrees and agreements between Twentieth Century Life and the North Carolina Department of Insurance and the Florida Department of Insurance, and without disclosure to the policy holders, the North Carolina Department of Insurance, the Florida Department of Insurance, or the other members of the Board of Directors and minority stockholders of Twentieth Century Financial Corporation, would not record the sale of such unrecorded policies on the official books and records of Twentieth Century Life, and would not report the sale of such unrecorded policies to the North Carolina Department of Insurance and the Florida Department of Insurance, or the other members of the Board of Directors and minority stockholders;

c. Candace L. Cooper would keep a handwritten log of the policies that had been sold and not reported to the North

Carolina Department of Insurance and the Florida Department of Insurance;

d. defendant LOUIS J. HEVEY would keep a handwritten schedule of moneys received from the sale of said unrecorded policies;

e. the defendant and other co-conspirators would submit and cause to be submitted false reports to the North Carolina Department of Insurance and the Florida Department of Insurance concerning the amount of money received from the sale of the unrecorded policies sold by Twentieth Century Life;

f. the defendant and other co-conspirators would open bank accounts for the purpose of depositing and utilizing the proceeds from the sale of the unrecorded policies sold by Twentieth Century Life, and would not disclose the existence of said bank accounts or the moneys deposited to said bank accounts to the North Carolina Department of Insurance and the Florida Department of Insurance or to the other members of the Board of Directors and minority stockholders of Twentieth Century Financial Corporation;

g. the defendant and other co-conspirators would submit and cause to be submitted false reports to the North Carolina Department of Insurance and the Florida Department of Insurance concerning, the amount of premiums collected;

h. the defendant and other co-conspirators also concealed from its outside auditors the sale of the unrecorded policies sold by Twentieth Century Life, the existence of the Twentieth Century bank accounts utilized to deposit the moneys front the sale of the unrecorded policies, thereby causing the outside auditors to prepare false and incomplete financial statements of Twentieth Century Life and Twentieth Century Financial Corporation for presentation to the Board of Directors of Twentieth Century Financial Corporation.

i. Glenn H. Martin, for the purpose of lulling the minority shareholders into a false sense of security about the strength of their investment in Twentieth Century Financial Corporation, would cause to be mailed to minority shareholders of Twentieth Century Financial Corporation letters and documents that falsely portrayed Twentieth Century Financial Corporation and Twentieth Century Life as financially solvent corporations with promising financial futures, failing to disclose the precarious

financial conditions of Twentieth Century Financial Corporation and Twentieth Century Life;

j. Glenn H. Martin would receive approximately $250,000 cash from the sale of five $50,000 single premium annuity policies, which cash was placed into the office safe of GLENN H. MARTIN. Thereafter, in order to evade the currency transaction reporting requirements of Title 31, United States Code, Section 5313(a), which required a Currency Transaction Report to be filed with the United States Treasury by any financial institution receiving a deposit in excess of $10,000 cash, defendant LOUIS J. HEVEY and other co-conspirators structured a series of financial transactions in numerous cash deposits of less than $10,000 each over a period of approximately six weeks.

OVERT ACTS

3. In furtherance of the conspiracy and scheme to defraud, and to effect the objectives thereof, in the Middle District of Florida and elsewhere, the defendant and other co-conspirators performed one or more of the following overt acts:

(1) On or about June 21, 1989, Glenn H. Martin received $250,000 cash from the sale of five annuities, caused the sale of the annuities and receipt of the cash not to be reported in the official books and records of Twentieth Century Life, and placed or caused the money to be placed into an office safe.

(2) On or about June 27, 1989, the defendant and other co-conspirators opened and caused to be opened at American Pioneer Bank, Orlando, Florida, bank account number 0870610537, entitled "20th Century Life Insurance Co. Commissions Account."

(3) On or about the dates listed below, defendant LOUIS J. HEVEY instructed an employee of Twentieth Century Life to remove cash totaling $223,880 from the sale of the five annuities specified above and to deposit to federally-insured financial institutions cash in increments of less than $10,000.

(4) On or about August 1, 1989, Glenn H. Martin and Candace L. Cooper signed the Consent Order with the Florida Department of Insurance.

(5) From on or about August 28, 1989 until on or about August 31, 1989, the defendant deposited premiums on approximately twenty-three unrecorded single premium whole life or annuity policies, and Candace L. Cooper subsequently caused the policies to be mailed to the agents who sold the policies.

(6) From on or about September 1, 1989 until on or about September 30, 1989, the defendant deposited premiums on approximately thirty-five unrecorded single premium whole life or annuity policies, and Candace L. Cooper subsequently caused the policies to be mailed to the agents who sold the policies.

(7) From on or about October 1, 1989 until on or about October 31, 1989, the defendant deposited premiums on approximately twenty-nine unrecorded single premium whole life or annuity policies, and Candace L. Cooper subsequently caused the policies to be mailed to the agents who sold the policies.

(8) On or about the dates listed below, defendant LOUIS J. HEVEY submitted to the Florida Department of Insurance a schedule falsely reflecting the amount of new Florida premiums written by Twentieth Century Life for the time period listed below:

Date submitted	Time period of report	Amount of premiums reported	Amount of premiums actually received
10/19/89	08/01/89 to 09/30/89	$229,684.00	$1,355,251.00
10/31/89	10/01/89 to 10/15/89	$ 13,068.00	$ 197,446.00
11/15/89	10/01/89 to 10/31/89	$ 29,399.00	$ 843,568.00
11/30/89	11/01/89 to 11/15/89	$ 29,244.00	$ 463,718.00
12/18/89	11/01/89 to 11/30/89	$ 58,814.00	$1,496,985-00
01/03/90	12/01/89 to 12/15/89	$ 3 6, 8 09.00	$1,748,766.00
01/15/90	12/01/89 to 12/31/89	$ 96,019-00	$2,493,083.00

02/02/90	01/01/90 to 01/15/90	$101,888.00	$ 195,646.00
02/15/90	01/01/90 to 01/31/90	$495,524.00	$ 363,366.00
03/01/90	02/01/90 to 02/15/90	$375,506.00	$ 21,306.00

(9) On or about the dates listed below, defendant LOUIS J. HEVEY submitted and caused to be submitted to the Florida Department of Insurance Bureau of Collateral Securities, to be held in trust by said department, Certificate of Deposits payable to Twentieth Century Life from Sun Bank, in the amounts listed below, which amounts were substantially less than the amount of actual premiums received by Twentieth Century Life, as required by the agreements with the Florida Department of Insurance:

Date submitted	Amount of CD
10/25/89	$200,000.00
10/31/89	$ 15,000.00
11/01/89	$50,000.00
11/15/89	$10,000.00
11/30/89	$25,000.00
12/18/89	$30,000.00
01/03/90	$95,000.00
02/01/90	$205,000.00
02/15/90	$300,000.00
03/01/90	$70,000.00

(10) From on or about November 1, 1989 until on or about November 30, 1989, the defendant deposited premiums on approximately thirty unrecorded single premium whole life or annuity policies, and Candace L. Cooper subsequently caused the policies to be mailed to the agents who sold the policies, without recording the existence of the policies in the official books and records of Twentieth Century Life.

(11) On or about November 16, 1989, the defendant and other coconspirators submitted and caused to be submitted to the North Carolina Department of Insurance, Twentieth Century Life's September 30, 1989 Quarterly Statement, which report was

false, in that it did not report the moneys obtained from the sale of the unrecorded policies, and did not report the existence or the balance of the American Pioneer Bank account number 0870610537, entitled "20th Century Life Insurance Co. Commissions Account," which bank account was utilized for depositing the proceeds from the sale of the unrecorded policies sold by Twentieth Century Life.

(12) On or about November 17, 1989, the defendant and other co-conspirators submitted and caused to be submitted to the Florida Department of Insurance, Twentieth Century Life's September 30, 1989 Quarterly Statement, which report was false, in that it did not report the moneys obtained from the sale of the unrecorded policies, and did not report the existence of or the balance in the American Pioneer Bank account number 0870610537, entitled "20th Century Life Insurance Co. Commissions Account," which bank account was utilized for depositing the proceeds from the sale of the unrecorded policies sold by Twentieth Century Life.

(13) On or about December 1, 1989, the defendant and other co-conspirators submitted and caused to be submitted to the Florida Department of Insurance, Twentieth Century Life's Amended September 30, 1989 Quarterly Statement, which report was false, in that it did not report the moneys obtained from the sale of the unrecorded policies, and did not report the existence of the balance in the American Pioneer Bank account number 0870610537, entitled "20th Century Life Insurance Co. Commissions Account," which bank account was utilized for depositing the proceeds from the sale of the unrecorded policies sold by Twentieth Century Life.

(14) From on or about December 1, 1989 until on or about December 3 1, 1989, the defendant deposited premiums on approximately fifty-five unrecorded single premium whole life or annuity policies, and Candace L. Cooper subsequently caused the policies to be mailed to the agents who sold the policies.

(15) On or about December 15, 1989, Glenn H. Martin and Candace L. Cooper signed the Consent Order with the Florida Department of Insurance.

(16) On or about December 22, 1989, the defendant and other co-conspirators opened or caused to be opened at

Central National Bank, Winter Park, Florida, account number 0001007808, entitled "20th Century Life Insurance Company."

(17) From on or about January 1, 1990 until on or about January 31, 1990, the defendant deposited premiums on approximately fifty-seven unrecorded single premium whole life or annuity policies, and Candace L. Cooper subsequently caused the policies to be mailed to the agents who sold the policies.

(18) From on or about February 1, 1990 until on or about February 28, 1990, the defendant deposited premiums on approximately twenty-one unrecorded single premium whole life or annuity policies, and Candace L. Cooper subsequently caused the policies to be mailed to the agents who sold the policies.

(19) On or about February 18, 1990, the defendant and other co-conspirators submitted and caused to be submitted to the Florida Department of Insurance Twentieth Century Life's 1989 Annual Statement, which report was false, in that it did not report the moneys obtained from the sale of the unrecorded policies, and did not report the existence of or the balance in the American Pioneer Bank account number 870610537, entitled "20th Century Life Insurance Co. Commissions Account," or the Central National Bank account number 0001007808, entitled "20th Century Life Insurance Company," both of which bank accounts were utilized for depositing the proceeds from the sale of the unrecorded policies sold by Twentieth Century Life.

(20) On or about February 28, 1990, the defendant and other co-conspirators submitted and caused to be submitted to the North Carolina Department of Insurance Twentieth Century Life's 1989 Annual Statement, which report was false, in that it did not report the moneys obtained from the sale of the unrecorded policies, and did not report the existence of or the balance in the American Pioneer Bank account number 870610537, entitled "20th Century Life Insurance Co. Commissions Account," or the Central National Bank account number 0001007808, entitled "20th Century Life Insurance Company," both of which bank accounts were utilized for depositing the proceeds from the sale of the unrecorded policies sold by Twentieth Century Life.

(21) From on or about March 1, 1990 until on or about March 31, 1990, the defendant deposited premiums on approximately thirty-eight unrecorded single premium whole life

or annuity policies, and Candace L. Cooper subsequently caused the policies to be mailed to the agents who sold the policies.

(22) On or about March 14, 1989, the defendant and other co-conspirators opened or caused to be opened at Florida National Bank (subsequently changed to First Union National Bank of Florida), Maitland, Florida, account number 0876036750 (subsequently changed to 14160367501), entitled "Twentieth Century Life Insurance Co."

(23) On or about March 26, 1990, Glenn H. Martin submitted and caused to be submitted to the Florida Department of Insurance a letter in which he stated "I believe Twentieth has complied with the material portions of the August and December Consent Orders."

(24) From on or about April 1, 1990 until on or about April 30, 1990, the defendant deposited premiums on approximately sixty-seven unrecorded single premium whole life or annuity policies, and Candace L. Cooper subsequently caused the policies to be mailed to the agents who sold the policies.

(25) From on or about May 1, 1990 until on or about May 31, 1990, the defendant deposited premiums on approximately twenty seven unrecorded single premium whole life or annuity policies, and Candice L. Cooper subsequently caused the policies to be mailed to the agents who sold the policies.

(26) On or about May 15, 1990, the defendant and other co-conspirators submitted and caused to be submitted to the North Carolina Department of Insurance Twentieth Century Life's March 31, 1990 Quarterly Statement, which report was false, in that it did not report the moneys obtained from the sale of the unrecorded policies, and did not report the existence of or the balance in the American Pioneer Bank account number 0870610537, entitled "20th Century Life Insurance Co. Commissions Account," the Central National Bank account number 0001007808, entitled "20th Century Life Insurance Company," or the First Union National Bank of Florida account number 14160367501, entitled "Twentieth Century Life Insurance Co.," all of which bank accounts were utilized for depositing the proceeds from the sale of the unrecorded policies sold by Twentieth Century Life.

(27) On or about May 16, 1990, the defendant and other co-conspirators submitted and caused to be submitted to the Florida Department of Insurance Twentieth Century Life's March 31, 1990 Quarterly Statement, which report was false, in that it did not report the moneys obtained from the sale of the unrecorded policies, and did not report the existence of or the balance in the American Pioneer Bank account number 0870610537, entitled "20th Century Life Insurance Co. Commissions Account," the Central National Bank account number 0001007808, entailed "20th Century Life Insurance Company," or the First Union National Bank of Florida account number 14160367501, entitled "Twentieth Century Life Insurance Co.," all of which bank accounts were utilized for depositing the proceeds from the sale of the unrecorded policies sold by Twentieth Century Life.

(28) From on or about June 1, 1990 until on or about June 30, 1990, the defendant deposited premiums on approximately sixteen unrecorded single premium whole life or annuity policies, and Candace L. Cooper subsequently caused the policies to be mailed to the agents who sold the policies.

(29) On or about June 22, 1990, Glenn H. Martin mailed or caused to mailed a letter to stockholders of Twentieth Century Financial Corporation, discussing in part the purported "outstanding growth and increased revenues" of Twentieth Century Life, failing to disclose the precarious financial conditions of Twentieth Century Financial Corporation and Twentieth Century Life.

(30) On or about June 26, 1990, Glenn H. Martin mailed or caused to be mailed a letter to stockholders of Twentieth Century Financial Corporation, which letter enclosed a "Shareholders'/Policyholders' Question and Answers Insurance Industry Supplement," which enclosure presented Twentieth Century Life as a successful, ongoing business concern, failing to disclose the precarious financial condition of Twentieth Century Financial Corporation and Twentieth Century Life.

(31) From on or about July 1, 1990 until on or about July 31, 1,990, the defendant deposited premiums on approximately three unrecorded single premium whole life or annuity policies, and Candace L. Cooper subsequently caused the policies to be mailed to who sold the policies.

(32) On or about July 18, 1990, Candace L. Cooper instructed Louise Angela Foulkes (Foulkes), Vice President of Administration of Twentieth Century Life Insurance Company, to enter the five $50,000 unrecorded annuities on the Twentieth Century Life computer system.

(33) On or about July 20, 1990, Candace L. Cooper instructed Foulkes on how to process any unrecorded policy applications while Cooper was away from the office.

(34) From on or about August 1, 1990 until on or about August 31, 1990, the defendant deposited premiums on approximately seven unrecorded single premium whole life or annuity policies, and Candace L. Cooper subsequently caused the policies to be mailed to the agents who sold the policies.

(35) On or about August 13, 1990, the defendant and other co-conspirators submitted and caused to be submitted to the Florida Department of Insurance Twentieth Century Life's June 30, 1990 Quarterly Statement, which report was false, in that it did not report the moneys obtained from the sale of the unrecorded policies, and did not report the existence of or the balance in the Central National Bank account number 0001007808, entitled "20th Century Life Insurance Company," or the First Union National Bank of Florida account number 14160367501, entitled "Twentieth Century Life Insurance Co.," both of which bank accounts were utilized for deposit the proceeds from the sale of the unrecorded policies sold by Twentieth Century Life.

(36) On or about August 13, 1990 the defendant and other co-conspirators submitted and caused to be submitted to the North Carolina Department of Insurance Twentieth Century Life's June 30, 1990 Quarterly Statement, which report was false, in that it did not report the moneys obtained from the sale of the unrecorded policies, and did not report the existence of or the balance in the Central National Bank account number 0001007808, entitled "20th Century Life Insurance Company," or the First Union National Bank of Florida account number 14160367501, entitled "Twentieth Century Life Insurance Co.," both of which bank accounts were utilized for depositing the proceeds from the sale of the unrecorded policies sold by Twentieth Century Life.

(37) On or about September 9, 1990, the defendant deposited premiums on one unrecorded single premium whole life or annuity policy, and Candace L. Cooper subsequently caused the policy to be mailed to the agent who sold the policy.

(38) On or about September 14, 1990, Candace L. Cooper, at the direction of Glenn H. Martin, instructed Foulkes to enter the unrecorded policies on the Twentieth Century Life computer system.

(39) From on or about September 16, 1990 through on or about September 21, 1990, Foulkes entered or caused to he entered all of the unrecorded policies on the Twentieth Century Life IBM computer system.

(40) From on or about August 28, 1989 until on or about September 9, 1990, Glenn H. Martin and Candace L. Cooper issued and caused to be issued approximately 409 unrecorded policies.

(41) From on or about August 25, 1989 until on or about August 31, 1990, the defendant and other co-conspirators deposited and caused to be deposited into various bank accounts approximately $9,500,000 from the sale of unrecorded policies.

(42) On or about October 10, 1990, Glenn R. Martin mailed or caused to be mailed a letter to stockholders of Twentieth Century Financial Corporation, which letter stated that Twentieth Century Financial Corporation was in the process of finalizing a public stock offering of a wholly-owned subsidiary, 21st Century Financial Corporation of America, failing to disclose the precarious financial conditions of Twentieth Century Financial Corporation and Twentieth Century Life.

(43) On or about February 12, 13, and 14, 1991, at the instruction of Candace L. Cooper, the unrecorded policies were transferred from Twentieth Century Life IBM computer to the Hewlett Packard computer by employees of Twentieth Century Life Insurance Company.

The government stipulates that there is no evidence that the defendant engaged in the above referenced activities with the intent of deriving a personal

benefit, other than to prevent his termination of employment by Glenn H. Martin.

10. Entire Agreement

This Plea Agreement constitutes the entire agreement between the government and the defendant with respect to the aforementioned guilty plea and no other promises, agreements or representations exist or have been made to the defendant or defendant's attorney with regard to such guilty plea.

11. Certification

The defendant and defendant's counsel certify that this Plea Agreement has been read in its entirety by (or has been read to) the defendant and that defendant fully understands its terms.

Dated this 9th day of November, 1994.

CHARLES R. WILSON
United States Attorney

By /s/ Thomas W. Turner
Assistant United States Attorney

By /s/ Edward C. Nucci
Managing Assistant U.S. Attorney

/s/ Louis J. Hevey
Defendant

/s/ Manuel Socias
Attorney for Defendant

[Certification of copy by Clerk omitted]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA,
ORLANDO DIVISION

United States Of America

v.

Glenn H. Martin and Candace L. Cooper

Case No. 94-155-CR-ORL-19

INDICTMENT

The Grand Jury charges:

COUNT ONE

1. At all times material to this Indictment:

a. Twentieth Century Financial Corporation of America (Twentieth Century Financial Corporation or TCFCA) was incorporated in the state of Florida, and conducted business in North Carolina, Florida, and elsewhere. Defendant GLENN H. MARTIN was the Chief Executive Officer, President, majority stockholder and Chairman of the Board of Directors; defendant CANDACE L. COOPER was the Corporate Secretary and a member of the Board of Directors; and Louis J. Hevey was the Corporate Treasurer. Twentieth Century Financial Corporation maintained a checking account at Sun Bank, Orlando , Florida.

b. Twentieth Century Life Insurance Company (Twentieth Century Life or TCL), a wholly-owned subsidiary of Twentieth Century Financial Corporation, was incorporated and chartered in the state of North Carolina, and conducted business in North Carolina, Florida, and elsewhere. Defendant GLENN H. MARTIN was the Chief Executive Officer, President, and Chairman of the Board of Directors; Candace L. Cooper was the Corporate Secretary and only other member of the Board of Directors; and Louis J. Hevey was the Corporate Treasurer.

Twentieth Century Life maintained corporate checking accounts at Sun Bank, Orlando, Florida.

c. Twentieth Century Life sold various types of insurance policies, including single premium whole life insurance policies, as well as single premium annuities, to its policy holders. These whole life insurance policies and annuities would accumulate cash values which could be redeemed by the policy holder or owner of the insurance policy or annuity (hereinafter policy holders or insured) under certain conditions specified in the life insurance policy or annuity. These policies also required Twentieth Century Life to pay death benefits in the event of death of the insured. Twentieth Century Life was also required by law to set up a reserve fund for these accumulated cash value and death benefits. These reserve funds were required to he held in a trust fund to be expended only for the benefit of policy holders. The ability of Twentieth Century Life to pay its contractual liabilities to policy holders and to hold and maintain the reserve funds required by law depended upon the financial soundness and liquidity (ability to pay current obligations) of the life insurance company.

d. The primary responsibility to make required payments to policy holders remained at all times with Twentieth Century Life. However, as additional protection for the policy holders of Twentieth Century Life and other life insurance companies, many state legislatures created insurance guaranty associations. Specifically, the states of North Carolina and Florida created by legislation the North Carolina Life, Accident, and Health Insurance Guaranty Association and the Florida Life and Health Insurance Guaranty Association, respectively, both non-profit entities or agencies. Subject to certain restrictions, the North Carolina Life, Accident, and Health Insurance Guaranty Association was required by law to reimburse all policy holders of life insurance companies domiciled within the state of North Carolina in the event of the insolvency or failure of any such life insurance company. Subject to certain restrictions, the Florida Life and Health Insurance Guaranty Association was required by law to reimburse policy holders residing in the state of Florida in the event of the insolvency or failure of a life insurance company licensed to do business within the state of Florida. These guaranty associations were funded through fees assessed all

licensed life insurance companies licensed to write business in the respective states.

e. As a condition of receiving a license to conduct business in the states of North Carolina and Florida, and to qualify for the protection of the North Carolina and Florida insurance guaranty associations for its policy holders, life insurance companies doing business in said states were required to submit to regulation by the state of North Carolina, through the North Carolina Department of Insurance, and by the state of Florida, through the Florida Department of Insurance. The North Carolina and Florida insurance guaranty associations relied upon said insurance departments to regulate and periodically audit and monitor the operations of such life insurance companies to determine whether the companies were making approved investments and maintaining proper reserves as required by North Carolina and Florida statutes. These statutes were intended to require insurance companies to maintain prudent investments and adequate financial reserves so that the insurance company would remain financially solvent and be able to meet their current and long term obligations, so as to insure the integrity of the insurance guaranty funds.

f. Financial Security Corporation of America (FSCA) was incorporated in the state of Florida, did business in North Carolina, Florida, and elsewhere, and marketed Twentieth Century Life Insurance Company products through various insurance agents. Defendant GLENN H. MARTIN was the Chief Executive Officer, defendant Candace L. Cooper was the Vice-President, and Louis J. Hevey was the Chief Financial Officer. FSCA maintained a checking account at Sun Bank, Orlando, Florida.

g. Martin's Home and Hobby House, Inc. (MHH), was incorporated in the state of Florida. Evelyn M. Martin, wife of defendant GLENN H. MARTIN, was the majority stockholder. MHH maintained checking accounts at Central National Bank (CNB), Winter Park, Florida, and at Sun Bank, Orlando, Florida. Martin's Home and Hobby House, Inc. was a separate entity from Twentieth Century Life.

h. Defendant Glenn H. Martin maintained several personal checking accounts, including:

(1) Account number 0411008307 at Bank of Central Florida (BCF), Orlando, Florida in the name of Glenn H. Martin, CLU-CHFC Insurance;

(2) Account number 0215252009243 at Sun Bank, Orlando, Florida in the name of Glenn H. Martin, CLU-CHFC Insurance;

(3) Account number 0776765980542 at Sun Bank, Orlando, Florida in the name of Glenn H. Martin; and

(4) Account number 0871147755 at American Pioneer Savings Bank, Winter Park, Florida (subsequently changed to account number 361-147556 at Southeast Bank, Winter Park, Florida), in the name of Glenn H. Martin/20th Account.

i. From on or about January 1, 1988 until on or about March 31, 1989, Twentieth Century Life advanced approximately $6,300,000 to related companies owned or controlled by defendant GLENN H. MARTIN, which companies in turn advanced a substantial portion of such proceeds to the personal use and benefit of defendant GLENN H. MARTIN.

j. On or about June 8, 1989, and continuing thereafter, due to the concerns of the North Carolina Department of Insurance about financial transactions between Twentieth Century Life and related companies owned or controlled by defendant GLENN H. MARTIN, and about the solvency and liquidity of Twentieth Century Life, and the soundness of its assets, and to protect the property interests of the Twentieth Century Life policy holders and the North Carolina Life, Accident, and Health Insurance Guaranty Association, the North Carolina Department of Insurance entered into a supervisory agreement with Twentieth Century Life which required Twentieth Century Life to be subject to the direct supervision of the North Carolina Department of Insurance and to abide by certain terms as a condition to being permitted to continue to operate in the life insurance field, including the following terms:

(1) That Twentieth Century Life would not make any withdrawals from any of its bank accounts without the approval of the North Carolina Department of Insurance;

(2) That Twentieth Century Life would not advance, and or invest any of its funds without the approval of the North Carolina Department of Insurance;

(3) That Twentieth Century Life would not enter into any transactions with related parties which transactions the North Carolina Department of Insurance determined to be excessive and not in the ordinary course of business;

(4) That Twentieth Century Life would deposit all receipts to accounts under the name and control of Twentieth Century Life; and

(5) That Twentieth Century Life would make all corporate books and records available to the North Carolina Department of Insurance and Twentieth Century Life would not remove books and records without the approval of the North Carolina Department of Insurance approval.

k. On or about June 16, 1989, due to the concerns of the Florida Department of Insurance about financial transactions between Twentieth Century Life and related companies owned or controlled by defendant GLENN H. MARTIN, and about the solvency and liquidity of Twentieth Century Life, and the soundness of its assets, and to protect the property interests of the Twentieth Century Life policy holders and the Florida Life and Health Insurance Guaranty Association, the Florida Department of Insurance issued a Cease and Desist Order prohibiting Twentieth Century Life from writing any new business in the State of Florida.

l. On or about August 1, 1989, the Florida Department of Insurance issued a Consent Order which modified its June 16, 1989, Cease and Desist Order. This Consent Order granted Twentieth Century Life a limited reinstatement of authority to write new business in Florida, subject to several conditions, including the following:

(1) That for every one dollar of Florida gross monthly premiums from the date of the Consent Order up to and including December 31, 1989 received by Twentieth Century Life, Twentieth Century Life was required to place on deposit an amount equal to one dollar in trust with the Florida Department of

Insurance, not to exceed a total of all deposits with the Florida Department of Insurance of $1.45 million;

(2) That Twentieth Century Life was required to limit its gross new Florida business monthly premiums to $200,000 or less for August 1989, and $500,000 or less per month for the period from September 1, 1989, through December 15, 1989, for a total of $2,200,000 or less for August 1, 1989 through December 15, 1989; and

(3) That Twentieth Century Life was not to make any disbursements from its bank accounts without the prior approval of the North Carolina Department of Insurance or Florida Department of Insurance.

m. On or about December 15, 1989, the Florida Department of Insurance extended its August 1, 1989 Consent Order, permitting Twentieth Century Life to continue writing new business, other than annuities, in Florida until March 31, 1990. This extension continued the previous terms of the Order and allowed Twentieth Century Life to continue accepting new premiums of $500,000 or less per month, for a total of $1,750,000 for the period of December 15, 1989 until March 31, 1990. The new order prohibited Twentieth Century Life from issuing any new annuity policies at all in the state of Florida.

2. From on or about June 8, 1989 until on or about April 14, 1991, in Orange County, Florida, in the Middle District of Florida, in Tallahassee, Florida, in the Northern District of Florida, in Raleigh, North Carolina, and elsewhere, GLENN H. MARTIN and CANDACE L. COOPER, the defendants herein, and other persons known and unknown to the Grand Jury, knowingly and willfully conspired, confederated, and agreed:

a. to defraud:

1) the policy holders of Twentieth Century Life Insurance Company of money and of their property interest in the solvency and liquidity of Twentieth Century Life Insurance Company and its ability to promptly redeem its policies, when contractually obligated to do so;

2) the North Carolina Life, Accident, and Health Insurance Guaranty Association and the Florida Life and Health

Insurance Guaranty Association of money and their property interests in the solvency and liquidity of Twentieth Century Life Insurance Company and its ability to promptly redeem its policies, when contractually obligated to do so, without jeopardizing the money, fund, and property of said guaranty associations; and

3) the minority stockholders of Twentieth Century Financial Corporation of America of money, and their property interests in the stock of Twentieth Century Financial Corporation of America and of the profitability, solvency, and liquidity of Twentieth Century Life, the wholly-owned subsidiary of TCFCA; and to obtain money and property by means of false pretenses, representations, and promises, and to use or cause to be used the United States mails in furtherance of said scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, in violation of Title 18, United States Code, Section 1341 and 2;

b. to knowingly and willfully conduct and attempt to conduct financial transactions affecting interstate commerce which involved the proceeds of specified unlawful activity, that is, mail fraud, in violation of Title 18, United States Code, Sections 1956(a)(1)(A)(i);

c. to knowingly and willfully conduct and attempt to conduct financial transactions affecting interstate commerce which involved the proceeds of specified unlawful activity, that is, mail fraud, in violation of Title 18, United States Code, Section 1341, with the intent in whole or in part to conceal and disguise the nature, location, source, ownership, or control of the proceeds of specified unlawful activity and that while conducting and attempting to conduct such financial transactions, knowing that the property involved in the financial transactions represented the proceeds of some form of unlawful activity, in violation of Title 18, United States Code, Section 1956(a)(1)(B)(i); and

d. to knowingly and intentionally, engage, and attempt to engage, and cause others to engage in monetary transactions affecting interstate commerce, in criminally derived property of a value greater that $10,000, such property having been derived from a specified unlawful activity, that is mail fraud, in violation

of 18 U.S.C. §1341, in violation of Title 18, United States Code, Section 1957.

The substance of this conspiracy and scheme to defraud is described more fully below.

MANNER AND MEANS

3. It was part of said conspiracy and scheme to defraud that:

a. the defendants would cause to be sold certain Twentieth Century Life single premium life and annuity insurance policies to potential policy holders of Twentieth Century Life, by falsely representing Twentieth Century Life to be a financially sound and solvent life insurance company; by offering to pay interest or dividend rates of 10 to 10-1/2 percent, failing to disclose to said potential policy holders that Twentieth Century Life was not earning sufficient income from its investments to pay the promised interest or dividend rates; that the ability to repay the principal and interest to existing policy holders would depend upon the ability of Twentieth Century Life to continue to obtain premiums from new policy holders; and by failing to disclose that the defendants intended to intentionally circumvent and disobey the consent decrees and agreements with the North Carolina and Florida Departments of Insurance, so that the defendants could misappropriate a substantial portion of the premiums to the personal use and benefit of defendant GLENN H. MARTIN, to the use and benefit of other corporations owned or controlled by defendant GLENN H. MARTIN, and to the use and benefit of family members of defendant GLENN H. MARTIN.

b. the defendants, in violation of the restrictions of the consent decrees and agreements between Twentieth Century Life and the North Carolina Department of Insurance and the Florida Department of Insurance, and without disclosure to the policy holders, the North Carolina Department of Insurance, the Florida Department of Insurance, or the other members of the Board of Directors and minority stockholders of Twentieth Century Financial Corporation, would not record the sale of such unrecorded policies on the official books and records of Twentieth Century Life, and would not report the sale of such unrecorded policies to the North Carolina Department of Insurance and the

Florida Department of Insurance, or the other members of the Board of Directors and minority stockholders in order to facilitate the scheme of the defendants to misappropriate a substantial portion of the premiums to the personal use and benefit of defendant GLENN H. MARTIN, to the use and benefit of other corporations owned or controlled by defendant GLENN H. MARTIN, or to the use and benefit of family members of defendant GLENN H. MARTIN.

c. Defendant CANDACE L. COOPER would keep a handwritten log of the policies that had been sold and not reported to the North Carolina Department of Insurance and the Florida Department of Insurance.

d. Louis J. Hevey would keep a handwritten schedule of moneys received from the sale of said unrecorded policies.

e. the defendants would submit and cause to be submitted false reports to the North Carolina Department of Insurance and the Florida Department of Insurance concerning the amount of money received from the sale of the unrecorded policies sold by Twentieth Century Life.

f. the defendants would open bank accounts for the purpose of depositing and utilizing the proceeds from the sale of the unrecorded policies sold by Twentieth Century Life, and would not disclose the existence of said bank accounts or the moneys deposited to said bank accounts to the North Carolina Department of Insurance and the Florida Department of Insurance or to the other members of the Board of Directors and minority stockholders of Twentieth Century Financial Corporation;

g. the defendants would divert and misappropriate substantial sums of moneys obtained from the sale of the unrecorded policies to defendant GLENN H. MARTIN and the other corporations and entities owned and controlled by GLENN H. MARTIN, and to the use and benefit of family members of GLENN H. MARTIN.

h. the defendants would submit and cause to be submitted false reports to the North Carolina Department of Insurance and the Florida Department of Insurance concerning the amount of premiums collected, failing to disclose the misappropriation of funds to the personal use and benefit of defendant GLENN H. MARTIN, to the use and benefit of other corporations owned or controlled by defendant GLENN H.

MARTIN, and to the use and benefit of family members of defendant GLENN H. MARTIN.

i. the defendants also concealed from its outside auditors the sale of the unrecorded policies sold by Twentieth Century Life, the existence of the Twentieth Century bank accounts utilized to deposit the moneys front the sale of the unrecorded policies, thereby causing the outside auditors to prepare false and incomplete financial statements of Twentieth Century Life and Twentieth Century Financial Corporation for presentation to the Board of Directors of Twentieth Century Financial Corporation.

j. defendant GLENN H. MARTIN, for the purpose of lulling the minority shareholders into a false sense of security about the strength of their investment in Twentieth Century Financial Corporation, would cause to be mailed to minority shareholders of Twentieth Century Financial Corporation letters and documents that falsely portrayed Twentieth Century Financial Corporation and Twentieth Century Life as financially solvent corporations with promising financial futures, failing to disclose the precarious financial conditions of Twentieth Century Financial Corporation and Twentieth Century Life and the ongoing misappropriation of funds by defendant GLENN H. MARTIN from the sale of single premium whole life and annuity policies;

k. the defendants would prepare false documentation in an attempt to give the appearance that the misappropriation of premium by defendant GLENN H. MARTIN was justified pursuant to a purported addendum to an existing marketing agreement between Financial Security Corporation of America and Twentieth Century Life Insurance Company.

OVERT ACTS

4. In furtherance of the conspiracy and scheme to defraud, and to effect the objectives thereof, in the Middle District of Florida and elsewhere, the defendants performed one or more of the following overt acts:

(1) On or about June 21, 1989, defendant GLENN H. MARTIN received $250,000 cash from the sale of five annuities, caused the sale of the annuities and receipt of the cash not to be

reported in the official books and records of Twentieth Century Life, and placed or caused the money to be placed into an office safe.

(2) On or about June 27, 1989, the defendant and other co-conspirators opened and caused to be opened at American Pioneer Bank, Orlando, Florida, bank account number 0870610537, entitled "20th Century Life Insurance Co. Commissions Account."

(3) On or about the dates listed below, Louis J. Hevey instructed an employee of Twentieth Century Life to remove cash totaling $223,880 from the sale of the five annuities specified above and to deposit cash in increments of less than $10,000 to the following accounts indicated below:

(a) Martin's Home and Hobby at Central National Bank (MHH acct-CNB) and at Sun Bank (MHH acct-Sun Bank), accounts controlled by the wife of defendant GLENN H. MARTIN;

(b) GLENN H. MARTIN, CLU-CHFC Insurance at Bank of Central Florida (Martin's CLU acct-BCF), and GLENN H. MARTIN, CLU-CHFC Insurance at Sun Bank (Martin's CLU acct-Sun Bank), both personal accounts of defendant GLENN H. MARTIN; and

(c) Financial Security Corporation of America at Sun Bank (FSCA acct-Sun Bank) and Twentieth Century Financial Corporation of America at Sun Bank, (TCFCA acct-Sun Bank), non-Twentieth Century Life accounts controlled by defendant GLENN H. MARTIN:

Date	MHH acct-CNB	MHH acct-Sun Bank	Martin's CLU acct-BCF	Martin's CLU acct-Sun Bank	FSCA acct-Bank	TCFCA acct-Sun Bank
07/12/89	$ 4,000					
07/17/89	$ 4,000					
07/18/89	$ 3,000					
07/20/89	$ 5,000	$ 5,000		$ 5,000		
07/24/89	$ 5,000					
07/25/89		$ 5,000		$ 5,000		
07/26/89	$ 5,000	$ 5,000				

07/28/89	$ 5,000	$ 5,000	$ 5,000			
07/31/89	$ 5,000	$ 5,000				
08/01/89	$ 4,000	$ 4,980	$ 5,000			
08/02/89	$ 5,000	$ 5,000	$ 4,900			
08/03/89			$ 1,000			
08/10/89		$ 8,000				
08/11/89	$ 8,000	$ 8,000	$ 8,000			
08/14/89	$ 8,000	$ 8,000	$ 8,000	$ 8,000		
08/15/89	$ 4,000	$ 4,000	$ 8,000			
08/21/89	$ 5,000	$ 8,000		$ 5,000		
08/22/89						$ 8,000
08/23/89						$ 6,000
08/24/89						$ 6,000
Totals:	$70,000	$ 40,980	$ 58,900	$ 5,000	$24,000	$ 25,000

(4) On or about August 1, 1989, defendants GLENN H. MARTIN and CANDACE L. COOPER signed the Consent Order with the Florida Department of Insurance.

(5) From on or about August 28, 1989 until on or about August 31, 1989, the defendant deposited premiums on approximately 23 unrecorded single premium whole life or annuity policies, and defendant CANDACE L. COOPER subsequently caused the policies to be mailed to the agents who sold the policies.

(6) From on or about September 1, 1989 until on or about September 30, 1989, the defendant received premiums on approximately 35 unrecorded single premium whole life or annuity policies, and defendant CANDACE L. COOPER subsequently caused the policies to be mailed to the agents who sold the policies.

(7) From on or about October 1, 1989 until on or about October 31, 1989, the defendants received premiums on approximately 29 unrecorded single premium whole life or annuity policies, and defendant CANDACE L. COOPER subsequently caused the policies to be mailed to the agents who sold the policies.

(8) On or about the dates listed below, Louis J. Hevey submitted to the Florida Department of Insurance a schedule

falsely reflecting the amount of new Florida premiums written by Twentieth Century Life for the time period listed below:

Date submitted	Time period of report	Amount of premiums reported	Amount of premiums actually received
10/19/89	08/01/89 to 09/30/89	$229,684.00	$1,355,251.00
10/31/89	10/01/89 to 10/15/89	$ 13,068.00	$ 197,446.00
11/15/89	10/01/89 to 10/31/89	$ 29,399.00	$ 843,568.00
11/30/89	11/01/89 to 11/15/89	$ 29,244.00	$ 463,718.00
12/18/89	11/01/89 to 11/30/89	$ 58,814.00	$1,496,985-00
01/03/90	12/01/89 to 12/15/89	$ 3 6, 8 09.00	$1,748,766.00
01/15/90	12/01/89 to 12/31/89	$ 96,019-00	$2,493,083.00
02/02/90	01/01/90 to 01/15/90	$101,888.00	$ 195,646.00
02/15/90	01/01/90 to 01/31/90	$495,524.00	$ 363,366.00
03/01/90	02/01/90 to 02/15/90	$375,506.00	$ 21,306.00

(9) On or about the dates listed below, Louis J. Hevey submitted and caused to be submitted to the Florida Department of Insurance Bureau of Collateral Securities, to be held in trust by said department, Certificate of Deposits payable to Twentieth Century Life from Sun Bank, in the amounts listed below, which amounts were substantially less than the amount of actual premiums received by Twentieth Century Life, as required by the agreements with the Florida Department of Insurance:

Date submitted	Amount of CD
10/25/89	$200,000.00
10/31/89	$15,000.00
11/01/89	$50,000.00
11/15/89	$10,000.00
11/30/89	$25,000.00
12/18/89	$30,000.00
01/03/90	$95,000.00
02/01/90	$205,000.00
02/15/90	$300,000.00
03/01/90	$70,000.00

(10) From on or about November 1, 1989 until on or about November 30, 1989, the defendants received premiums on approximately 30 unrecorded single premium whole life or annuity policies, and defendant CANDACE L. COOPER subsequently caused the policies to be mailed to the agents who sold the policies, without recording the existence of the policies in the official books and records of Twentieth Century Life.

(11) On or about November 16, 1989, the defendants submitted and caused to be submitted to the North Carolina Department of Insurance, Twentieth Century Life's September 30, 1989 Quarterly Statement, which report was false, in that it did not report the moneys obtained from the sale of the unrecorded policies, and did not report the existence or the balance of the American Pioneer Bank account number 0870610537, entitled "20th Century Life Insurance Co. Commissions Account," which bank account was utilized for depositing the proceeds from the sale of the unrecorded policies sold by Twentieth Century Life.

(12) On or about November 17, 1989, the defendants submitted and caused to be submitted to the Florida Department of Insurance, Twentieth Century Life's September 30, 1989 Quarterly Statement, which report was false, in that it did not report the moneys obtained from the sale of the unrecorded policies, and did not report the existence of or the balance in the American Pioneer Bank account number 0870610537, entitled "20th Century Life Insurance Co. Commissions Account," which bank account was utilized for depositing the proceeds from the sale of the unrecorded policies sold by Twentieth Century Life.

(13) On or about December 1, 1989, the defendant and other co-conspirators submitted and caused to be submitted to the Florida Department of Insurance, Twentieth Century Life's Amended September 30, 1989 Quarterly Statement, which report was false, in that it did not report the moneys obtained from the sale of the unrecorded policies, and did not report the existence of the balance in the American Pioneer Bank account number 0870610537, entitled "20th Century Life Insurance Co. Commissions Account," which bank account was utilized for depositing the proceeds from the sale of the unrecorded policies sold by Twentieth Century Life.

(14) From on or about December 1, 1989 until on or about December 3 1, 1989, the defendant received premiums on approximately 55 unrecorded single premium whole life or annuity policies, and defendant CANDACE L. COOPER subsequently caused the policies to be mailed to the agents who sold the policies.

(15) On or about December 15, 1989, defendants Glenn H. Martin and Candace L. Cooper signed the Consent Order with the Florida Department of Insurance.

(16) On or about December 22, 1989, the defendants opened or caused to be opened at Central National Bank, Winter Park, Florida, account number 0001007808, entitled "20th Century Life Insurance Company."

(17) From on or about January 1, 1990 until on or about January 31, 1990, the defendant received premiums on approximately 57 unrecorded single premium whole life or annuity policies, and defendant CANDACE L. COOPER subsequently caused the policies to be mailed to the agents who sold the policies.

(18) From on or about February 1, 1990 until on or about February 28, 1990, the defendant received premiums on approximately 21 unrecorded single premium whole life or annuity policies, and defendant CANDACE L. COOPER subsequently caused the policies to be mailed to the agents who sold the policies.

(19) On or about February 18, 1990, the defendants submitted and caused to be submitted to the Florida Department of Insurance Twentieth Century Life's 1989 Annual Statement, which report was false, in that it did not report the moneys

obtained from the sale of the unrecorded policies, and did not report the existence of or the balance in the American Pioneer Bank account number 870610537, entitled "20th Century Life Insurance Co. Commissions Account," or the Central National Bank account number 0001007808; entitled "20th Century Life Insurance Company," both of which bank accounts were utilized for depositing the proceeds from the sale of the unrecorded policies sold by Twentieth Century Life.

(20) On or about February 28, 1990, the defendants submitted and caused to be submitted to the North Carolina Department of Insurance Twentieth Century Life's 1989 Annual Statement, which report was false, in that it did not report the moneys obtained from the sale of the unrecorded policies, and did not report the existence of or the balance in the American Pioneer Bank account number 870610537, entitled "20th Century Life Insurance Co. Commissions Account," or the Central National Bank account number 0001007808, entitled "20th Century Life Insurance Company," both of which bank accounts were utilized for depositing the proceeds from the sale of the unrecorded policies sold by Twentieth Century Life.

(21) From on or about March 1, 1990 until on or about March 31, 1990, the defendants received premiums on approximately 38 unrecorded single premium whole life or annuity policies, and defendant CANDACE L. COOPER subsequently caused the policies to be mailed to the agents who sold the policies.

(22) On or about March 14, 1989, the defendants opened or caused to be opened at Florida National Bank (subsequently changed to First Union National Bank of Florida), Maitland, Florida, account number 0876036750 (subsequently changed to 14160367501), entitled "Twentieth Century Life Insurance Co."

(23) On or about March 26, 1990, defendant GLENN H. MARTIN submitted and caused to be submitted to the Florida Department of Insurance a letter in which he stated "I believe Twentieth has complied with the material portions of the August and December Consent Orders."

(24) From on or about April 1, 1990 until on or about April 30, 1990, the defendants received premiums on approximately 67 unrecorded single premium whole life or annuity policies, and defendant CANDACE L. COOPER

subsequently caused the policies to be mailed to the agents who sold the policies.

(25) From on or about May 1, 1990 until on or about May 31, 1990, the defendants received premiums on approximately 27 unrecorded single premium whole life or annuity policies, and defendant CANDICE L. COOPER subsequently caused the policies to be mailed to the agents who sold the policies.

(26) On or about May 15, 1990, the defendants submitted and caused to be submitted to the North Carolina Department of Insurance Twentieth Century Life's March 31, 1990 Quarterly Statement, which report was false, in that it did not report the moneys obtained from the sale of the unrecorded policies, and did not report the existence of or the balance in the American Pioneer Bank account number 0870610537, entitled "20th Century Life Insurance Co. Commissions Account," the Central National Bank account number 0001007808, entitled "20th Century Life Insurance Company," or the First Union National Bank of Florida account number 14160367501, entitled "Twentieth Century Life Insurance Co.," all of which bank accounts were utilized for depositing the proceeds from the sale of the unrecorded policies sold by Twentieth Century Life.

(27) On or about May 16, 1990, the defendant and other co-conspirators submitted and caused to be submitted to the Florida Department of Insurance Twentieth Century Life's March 31, 1990 Quarterly Statement, which report was false, in that it did not report the moneys obtained from the sale of the unrecorded policies, and did not report the existence of or the balance in the American Pioneer Bank account number 0870610537, entitled "20th Century Life Insurance Co. Commissions Account," the Central National Bank account number 0001007808, entailed "20th Century Life Insurance Company," or the First Union National Bank of Florida account number 14160367501, entitled "Twentieth Century Life Insurance Co.," all of which bank accounts were utilized for depositing the proceeds from the sale of the unrecorded policies sold by Twentieth Century Life.

(28) From on or about June 1, 1990 until on or about June 30, 1990, the defendants received premiums on approximately 16 unrecorded single premium whole life or annuity policies, and

defendant CANDACE L. COOPER subsequently caused the policies to be mailed to the agents who sold the policies.

(29) On or about June 22, 1990, defendant GLENN H. MARTIN mailed or caused to mailed a letter to stockholders of Twentieth Century Financial Corporation, discussing in part the purported "outstanding growth and increased revenues" of Twentieth Century Life, failing to disclose the precarious financial conditions of Twentieth Century Financial Corporation and Twentieth Century Life and the ongoing misappropriation of funds by defendant GLENN H. MARTIN from the sale of single premium whole life and annuity policies.

(30) On or about June 26, 1990, Glenn H. Martin mailed or caused to be mailed a letter to stockholders of Twentieth Century Financial Corporation, which letter enclosed a "Shareholders'/Policyholders' Question and Answers Insurance Industry Supplement," which enclosure presented Twentieth Century Life as a successful, ongoing business concern, failing to disclose the precarious financial condition of Twentieth Century Financial Corporation and Twentieth Century Life and the ongoing misappropriation of funds by defendant GLENN H. MARTIN from the sale of single premium whole life and annuity policies.

(31) From on or about July 1, 1990 until on or about July 31, 1,990, the defendants received premiums on approximately 3 unrecorded single premium whole life or annuity policies, and defendant CANDACE L. COOPER subsequently caused the policies to be mailed to who sold the policies.

(32) On or about July 18, 1990, defendant CANDACE L. COOPER instructed Louise Angela Foulkes (Foulkes), Vice President of Administration of Twentieth Century Life Insurance Company, to enter the five $50,000 unrecorded annuities on the Twentieth Century Life computer system.

(33) On or about July 20, 1990, defendant CANDACE L. COOPER instructed Foulkes on how to process any unrecorded policy applications while COOPER was away from the office.

(34) From on or about August 1, 1990 until on or about August 31, 1990, the defendants received premiums on approximately 7 unrecorded single premium whole life or annuity policies, and defendant CANDACE L. COOPER subsequently

caused the policies to be mailed to the agents who sold the policies.

(35) On or about August 13, 1990, the defendants submitted and caused to be submitted to the Florida Department of Insurance Twentieth Century Life's June 30, 1990 Quarterly Statement, which report was false, in that it did not report the moneys obtained from the sale of the unrecorded policies, and did not report the existence of or the balance in the Central National Bank account number 0001007808, entitled "20th Century Life Insurance Company," or the First Union National Bank of Florida account number 14160367501, entitled "Twentieth Century Life Insurance Co.," both of which bank accounts were utilized for deposit the proceeds from the sale of the unrecorded policies sold by Twentieth Century Life.

(36) On or about August 13, 1990 the defendants submitted and caused to be submitted to the North Carolina Department of Insurance Twentieth Century Life's June 30, 1990 Quarterly Statement, which report was false, in that it did not report the moneys obtained from the sale of the unrecorded policies, and did not report the existence of or the balance in the Central National Bank account number 0001007808, entitled "20th Century Life Insurance Company," or the First Union National Bank of Florida account number 14160367501, entitled "Twentieth Century Life Insurance Co.," both of which bank accounts were utilized for depositing the proceeds from the sale of the unrecorded policies sold by Twentieth Century Life.

(37) On or about September 9, 1990, the defendants received premiums on one unrecorded single premium whole life or annuity policy, and defendant CANDACE L. COOPER subsequently caused the policy to be mailed to the agent who sold the policy.

(38) On or about September 14, 1990, defendant CANDACE L. COOPER, at the direction of defendant GLENN H. MARTIN, instructed Foulkes to enter the unrecorded policies on the Twentieth Century Life computer system.

(39) From on or about September 16, 1990 through on or about September 21, 1990, Foulkes entered or caused to he entered all of the unrecorded policies on the Twentieth Century Life IBM computer system.

(40) From on or about August 28, 1989 until on or about September 9, 1990, the defendants issued and caused to be issued approximately 409 unrecorded policies.

(41) From on or about August 25, 1989 until on or about August 31, 1990, the defendants deposited and caused to be deposited into various bank accounts, and subsequently diverted from said bank accounts, approximately $9,500,000 from the sale of unrecorded policies.

(42) On or about October 10, 1990, defendant GLENN H. MARTIN mailed or caused to be mailed a letter to stockholders of Twentieth Century Financial Corporation, which letter stated that Twentieth Century Financial Corporation was in the process of finalizing a public stock offering of a wholly-owned subsidiary, 21st Century Financial Corporation of America, failing to disclose the precarious financial conditions of Twentieth Century Financial Corporation and Twentieth Century Life and the ongoing misappropriation of funds by defendant GLENN H. MARTIN from the ale of single premium whole life and annuity policies.

(43) On or about February 12, 13, and 14, 1991, at the instruction of defendant CANDACE L. COOPER, the unrecorded policies were transferred from Twentieth Century Life IBM computer to the Hewlett Packard computer by employees of Twentieth Century Life Insurance Company.

All in violation of Title 18, United States Code, Section 371.

COUNTS TWO THROUGH EIGHTEEN

1. The Grand Jury realleges paragraph one of Count One, which paragraph is incorporated by reference, as though fully set forth herein.

2. From on or about June 8, 1989 until on or about February 14, 1991, in Orange County, Florida, in the Middle District of Florida, and elsewhere, GLENN H. MARTIN and CANDACE L. COOPER the defendants herein, knowingly and willfully devised and executed, and attempted to devise and execute, a scheme and artifice to defraud:

a. the policy holders of Twentieth Century Life Insurance Company of money and of their property interest in the

solvency and liquidity of Twentieth Century Life Insurance Company and its ability to promptly redeem its policies, when contractually obligated to do so;

b. the North Carolina Life, Accident, and Health Insurance Guaranty Association and the Florida Life and Health Insurance Guaranty Association of money and their property interests in the solvency and liquidity of Twentieth Century Life Insurance Company and its ability to promptly redeem its policies, when contractually obligated to do so, without jeopardizing the money, fund, and property of said guaranty associations; and

c. the minority stockholders of Twentieth Century Financial Corporation of America of money, and their property interests in the stock of Twentieth Century Financial Corporation of America and of the profitability, solvency, and liquidity of Twentieth Century Life, the wholly-owned subsidiary of TCFCA; and to obtain money and property by means of false pretenses, representations, and promises, and to use or cause to be used the United States mails in furtherance of said scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, in violation of Title 18, United States Code, Section 1341 and 2;

MANNER AND MEANS

The substance of this scheme to defraud is described more fully in paragraph 3 of Count One, which paragraph the Grand Jury realleges and incorporates by reference, as though fully set forth herein.

EXECUTION OF THE SCHEME

3. On or about the dates listed below in each count, in the Middle District of Florida, and elsewhere, for the purpose of executing and attempting to execute the scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, defendants GLENN H. MARTIN and CANDACE L. COOPER did knowingly cause to be sent and delivered by the United States

mail, and did knowingly cause to be taken and received from the United States mail, the following matters and things:

Count		
2	Date:	11/15/89
	From:	20th Century Life, P.O. Drawer 4964, 731 N. Garland Ave, Orlando, FL 32802
	To:	Hugh Barndoller, 7622 Congress, New Port Richey, FL 34656
	Contents:	Single Premium annuity policy no. 8910316A
3	Date:	11/15/89
	From:	20th Century Life Insurance Company, Financial Security Center, P.O. Drawer 5020, Maitland, FL 327510-8037
	To:	Christopher Shaw, State of Florida Dept of Insurance, Bureau of Collateral Securities, P.O. Box 5200, Tallahassee, FL 32314-5200
	Contents:	Letter from Hevey submitting Florida Premium Report and $10,000 required deposit
4	Date:	11/30/89
	From:	20th Century Life Insurance Company, Financial Security Center, P.O. Drawer 5020, Maitland, FL 327510-8037
	To:	Christopher Shaw, State of Florida Dept of Insurance, Bureau of Collateral Securities, P.O. Box 5200, Tallahassee, FL 32314-5200
	Contents:	Letter from Hevey submitting Florida Premium Report and $25,000 required deposit
5	Date:	1/16/90
	From:	20th Century Life, P.O. Drawer 4964, 731 N. Garland Ave, Orlando, FL 32802
	To:	Ronald Hickman, 6310 S.W. 41 Place, Davie, FL 33114
	Contents:	Single Premium annuity policy nos. 8920230A, 8920231A, and 8920232A
6	Date:	1/17/90
	From:	20th Century Life, P.O. Drawer 4964, 731 N. Garland Ave, Orlando, FL 32802

	To:	Kenneth Sanders, 4801 S. University Dr., Davie, FL 33328
	Contents:	Single Premium annuity policy no. 8920234A
7	Date:	1/29/90
	From:	20th Century Life, P.O. Drawer 4964, 731 N. Garland Ave, Orlando, FL 32802
	To:	Ronald Hickman, 6310 S.W. 41 Place, Davie, FL 33114
	Contents:	Single Premium annuity policy no. 8920247A
8	Date:	2/2/90
	From:	20th Century Life, P.O. Drawer 4964, 731 N. Garland Ave, Orlando, FL 32802
	To:	Kenneth Sanders, 4801 S. University Dr., Davie, FL 33328
	Contents:	Single Premium annuity policy nos. 8920253A and 8920255A
9	Date:	2/1/90
	From:	20th Century Life Insurance Company, Financial Security Center, P.O. Drawer 5020, Maitland, FL 327510-8037
	To:	Christopher Shaw, State of Florida Dept of Insurance, Bureau of Collateral Securities, P.O. Box 5200, Tallahassee, FL 32314-5200
	Contents:	Letter from Hevey submitting Florida $205,000 required deposit
10	Date:	4/18/90
	From:	Gresham Northcott, Bank of Union, 201 No. Charlotte Ave., Monroe, NC 28110
	To:	Sandi Morgan, 20th Century Life, 731 N. Garland Ave, Orlando, FL 32802
	Contents:	Application for Annuity and cashier's check for Hayne Baucom
11	Date:	5/15/90
	From:	Gresham Northcott, Bank of Union, 201 No. Charlotte Ave., Monroe, NC 28110
	To:	Sandi Morgan, 20th Century Life, 731 N. Garland Ave, Orlando, FL 32802
	Contents:	2 Applications for Annuity and cashier's check for Frederick McCallum & Ralph Williams

12 Date: 5/18/90
From: Gresham Northcott, Bank of Union, 201 No. Charlotte Ave., Monroe, NC 28110
To: Sandi Morgan, 20th Century Life, 731 N. Garland Ave, Orlando, FL 32802
Contents: 2 Applications for Annuity and cashier's check for Richard H. Boike and Al Carter

13 Date: 5/21/90
From: Gresham Northcott, Bank of Union, 201 No. Charlotte Ave., Monroe, NC 28110
To: Sandi Morgan, 20th Century Life, 731 N. Garland Ave, Orlando, FL 32802
Contents: Application for Annuity and cashier's check for Edna Byrd

14 Date: 5/22/90
From: Gresham Northcott, Bank of Union, 201 No. Charlotte Ave., Monroe, NC 28110
To: Sandi Morgan, 20th Century Life, 731 N. Garland Ave, Orlando, FL 32802
Contents: Application for Annuity and cashier's check for Rachel Horne

15 Date: 6/22/90
From: 20th Century Life, P.O. Drawer 5020, 341 N. Maitland Ave., Maitland, FL 32751-5020
To: Mr. Adolf Henn, 1703 Barcelona Way, Winter Park, FL 32789
Contents: Letter to TCFCA stockholders from GLENN H. MARTIN

16 Date: 6/26/90
From: 20th Century Life, P.O. Drawer 5020, 341 N. Maitland Ave., Maitland, FL 32751-5020
To: Mr. Adolf Henn, 1703 Barcelona Way, Winter Park, FL 32789
Contents: Letter to TCFCA stockholders from GLENN H. MARTIN

17 Date: 7/23/90
From: Gresham Northcott, Bank of Union, 201 No. Charlotte Ave., Monroe, NC 28110
To: 20th Century Life, 731 N. Garland Ave, Orlando, FL 32802, Attn: Lisa
Contents: Cashier's check #009272

18	Date:	10/10/90
	From:	FSCA, P.O. Box 945020, Maitland, FL 32794-5020
	To:	Mr. Adolf Henn, 1703 Barcelona Way, Winter Park, FL 32789
	Contents:	Letter to TCFCA stockholders from GLENN H. MARTIN

All in violation of title 18, United States Code, Sections 1341 and 2.

COUNTS NINETEEN THROUGH TWENTY-FIVE

1. The Grand Jury realleges paragraph one of Count One, which paragraph is incorporated by reference, as though fully set forth herein.

2. From on or about August 28, 1989 until on or about August 31, 1990, the defendants caused checks to be written to the benefit of defendant GLENN H. MARTIN or his family, and deposited and caused to be deposited into various individual or corporate bank accounts owned or controlled by defendant GLENN H. MARTIN, approximately $9,500,000 that had been received from the sale of unrecorded policies mention in the mail fraud scheme described in Counts Two through Eighteen.

3. On or about the dates listed below in each count, in the Middle District of Florida, and elsewhere, GLENN H. MARTIN and CANDACE L. COOPER the defendants herein, knowingly, intentionally, and unlawfully engaged, attempted to engage, and willfully caused others to engage, in monetary transactions affecting interstate commerce, in criminally derived property of a value greater than $10,000, that is the withdrawal, transfer, and deposit of funds and monetary instruments in the approximate amounts described below from and to the accounts described below, such property having been derived from a specified unlawful activity, that is, the proceeds of the mail fraud scheme described in Counts Two through Eighteen, in violation of 18 U.S.C. 1341.

Count

19	Date:	12/7/89
	Accounts:	From TCL Commissions Acct. #870610537 at American Pioneer Savings Bank, Orlando FL to GLENN H. MARTIN, CLU Acct. #214242009243 at Sun Bank, Orlando, FL
	Check/Wire:	Check #4063 dated 12-06-89 payable to GLENN H. MARTIN, CLU
	Amount:	$100,000.00
20	Date:	1/8/90
	Accounts:	From TCL Commissions Acct. #870610537 at American Pioneer Savings Bank, Orlando FL to GLENN H. MARTIN/20th Acct. #0871147755 at American Pioneer Savings Bank, Orlando, FL
	Check/Wire:	Check #4075 dated 1-8-90 payable to GLENN H. MARTIN/20th Acct
	Amount:	$150,000.00
21	Date:	1/31/90
	Accounts:	From TCL Acct. #1007808 at Central National Bank, Winter Park, FL to GLENN H. MARTIN/20th Acct. #361-147556 at Southeast Bank, N.A., Winter Park, FL
	Check/Wire:	Check #1010 dated 1-30-90 payable to GLENN H. MARTIN/20th Acct
	Amount:	$150,000.00
22	Date:	2/26/90
	Accounts:	From TCL Acct. #1007808 at Central National Bank, Winter Park, FL to GLENN H. MARTIN/20th Acct. #361-147556 at Southeast Bank, N.A., Winter Park, FL
	Check/Wire:	Check #1013 dated 2-22-90 payable to GLENN H. MARTIN/20th Acct
	Amount:	$400,000.00

23	Date:	3/16/90
	Accounts:	From TCL Acct. #1007808 at Central National Bank, Winter Park, FL to GLENN H. MARTIN/20th Acct. #361-147556 at Southeast Bank, N.A., Winter Park, FL
	Check/Wire:	Check #1020 dated 3-15-90 payable to GLENN H. MARTIN/20th Acct
	Amount:	$300,000.00
24	Date:	5/10/90
	Accounts:	From TCL Acct. #14160367501 at First Union National Bank, Maitland, FL to Victory Life Ins. Co. Acct. #10022000766 at Whitney National Bank, New Orleans, LA
	Check/Wire:	Wire transfer debit dated 5/10/90 to Victory Life Ins. Co.
	Amount:	$1,020,000.00
25	Date:	6/15/90
	Accounts:	From TCL Acct. #14160367501 at First Union National Bank, Maitland, FL to purchase First Union National Bank Cashier's Check payable to Jack R. Leonard, TRUST Acct., to purchase home for Christopher Martin
	Check/Wire:	Check #119 dated 6-15-90 payable to First Union National Bank
	Amount:	$196,313.74

All in violation of title 18, United States Code, Sections 1957 and 2.

COUNTS TWENTY-SIX THROUGH TWENTY-EIGHT

1. The Grand Jury realleges paragraph one of Count One, which paragraph is incorporated by reference, as though fully set forth herein.

2. From on or about August 28, 1989 until on or about August 31, 1990, the defendants caused checks to be written to the benefit of defendant GLENN H. MARTIN or his family, and deposited and caused to be deposited into various individual or corporate bank accounts owned or controlled by defendant GLENN H. MARTIN, approximately $9,500,000 that had been received from

the sale of unrecorded policies mention in the mail fraud scheme described in Counts Two through Eighteen.

3. On or about the dates listed below in each count, in the Middle District of Florida, and elsewhere, GLENN H. MARTIN and CANDACE L. COOPER the defendants herein, did knowingly and willfully attempt to conduct and cause to be conducted the financial transactions listed below in each count, which transaction affected interstate commerce and which involved the proceeds of specified unlawful activity, that is, the proceeds of the mail fraud scheme described in Counts Two through Eighteen, in violation of 18 U.S.C. 1341, with the intent to promote the carrying on of specified unlawful activity, that is, the proceeds of the mail fraud scheme described in Counts Two through Eighteen, in violation of 18 U.S.C. 1341, and that while conducting and attempting to conduct such financial transaction knew that the property involved in the financial transaction listed below in each count represented the proceeds of some form of unlawful activity:

Count		
26	Date:	3/2/90
	Accounts:	From GLENN H. MARTIN/20th Acct. #361-0147556 at Southeast Bank, N.A., Winter Park, FL to Glenn H. Martin Acct. #0776765980542 at Sun Bank, Orlando, FL
	Check/Wire:	Check #4115 dated 3-1-90 payable to GLENN H. MARTIN
	Amount:	$400,000.00
27	Date:	6/19/90
	Accounts:	From GLENN H. MARTIN/20th Acct. #361-0147556 at Southeast Bank, N.A., Winter Park, FL to GLENN H. MARTIN, CLU Acct. #215252009243 at Sun Bank, Orlando, FL
	Check/Wire:	Check #4149 dated 6-18-90 payable to GLENN H. MARTIN, CLU
	Amount:	$125,000.00

28	Date:	8/2/90
	Accounts:	From TCL Acct. #14160367501 at First Union National Bank, Maitland, FL to FICA Acct. #14165000504 at First Union National Bank, Maitland, FL
	Check/Wire:	Check #133 dated 8-2-90 payable to FICA drawn on account of TCL
	Amount:	$225,000.00

All in violation of Title 18, United States Code, Sections 1956(a)(1)(A)(i) and 2.

COUNTS TWENTY-NINE THROUGH THIRTY-THREE

1. The Grand Jury realleges paragraph one of Count One, which paragraph is incorporated by reference, as though fully set forth herein.

2. From on or about August 28, 1989 until on or about August 31, 1990, the defendants caused checks to be written to the benefit of defendant GLENN H. MARTIN or his family, and deposited and caused to be deposited into various individual or corporate bank accounts owned or controlled by defendant GLENN H. MARTIN, approximately $9,500,000 that had been received from the sale of unrecorded policies mention in the mail fraud scheme described in Counts Two through Eighteen.

3. On or about the dates listed below in each count, in the Middle District of Florida, and elsewhere, GLENN H. MARTIN and CANDACE L. COOPER the defendants herein, did knowingly and willfully attempt to conduct and attempt to conduct the financial transaction listed below in each count, which transaction affected interstate commerce and which represent the proceeds of specified unlawful activity, that is, the proceeds of the mail fraud scheme described in Counts Two through Eighteen, in violation of 18 U.S.C. 1341, with the intent in whole or in part to conceal and disguise the nature, location, source, ownership, or control of the proceeds of specified unlawful activity and that while conducting and attempting to conduct such financial transaction knew that the property involved in the financial transaction listed below in each count represented the proceeds of some form of unlawful activity:

Count

29 Date: 3/27/90
Accounts: From GLENN H. MARTIN/20th Acct. #361-0147556 at Southeast Bank, N.A., Winter Park, FL to GLENN H. MARTIN, CLU Acct. #21252009243 at Sun Bank, Orlando, FL
Check/Wire: Check #4125 dated 3-26-90 payable to GLENN H. MARTIN, CLU
Amount: $100,000.00

30 Date: 4/6/90
Accounts: From GLENN H. MARTIN/20th Acct. #361-0147556 at Southeast Bank, N.A., Winter Park, FL to GLENN H. MARTIN, CLU Acct. #21252009243 at Sun Bank, Orlando, FL
Check/Wire: Check #4128 dated 4-5-90 payable to GLENN H. MARTIN, CLU
Amount: $100,000.00

31 Date: 4/19/90
Accounts: From GLENN H. MARTIN/20th Acct. #361-0147556 at Southeast Bank, N.A., Winter Park, FL to GLENN H. MARTIN, CLU Acct. #21252009243 at Sun Bank, Orlando, FL
Check/Wire: Check #4131 dated 4-18-90 payable to GLENN H. MARTIN, CLU
Amount: $105,000.00

32 Date: 5/10/90
Accounts: From GLENN H. MARTIN/20th Acct. #361-0147556 at Southeast Bank, N.A., Winter Park, FL to GLENN H. MARTIN, CLU Acct. #21252009243 at Sun Bank, Orlando, FL
Check/Wire: Check #4137 dated 5-9-90 payable to GLENN H. MARTIN, CLU
Amount: $100,000.00

33 Date: 5/31/90
Accounts: From GLENN H. MARTIN/20th Acct. #361-0147556 at Southeast Bank, N.A., Winter Park, FL to GLENN H. MARTIN, CLU Acct. #21252009243 at Sun Bank, Orlando, FL
Check/Wire: Check #4143 dated 5-30-90 payable to GLENN H. MARTIN, CLU
Amount: $125,000.00

All in violation of Title 18, United States Code, Sections 1956(a)(1)(A)(i) and 2.

FORFEITURES

The allegations contained in Counts One through Thirty-three of this Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeitures pursuant to the provisions of Title 18, United States Code, Section 982.

The defendant, GLENN H. MARTIN, shall forfeit to the United States of America, pursuant to Title 18, United States Code, Section 982(a)(2), any and all right, title, and interest he may have in any property constituting, and derived from, proceeds the defendant GLENN H. MARTIN obtained directly and indirectly, as the result of his violations of Title 18, United States Code, Section 1957 (engaging in monetary transactions in property derived from specified unlawful activity), alleged in Counts Nineteen through Twenty-Five of this Indictment; Title 18, United States Code, Section 1956(a)(1)(A)(i) (laundering of monetary instruments), alleged in Counts Twenty-Six through Twenty-Eight of this Indictment; and Title 18, United States Code, Section 1956(a)(1)(B)(i) (laundering of monetary instruments), alleged in Counts Twenty-Nine through Thirty-Three of this Indictment.

If any of the property as a result of any act or omission of the defendant:

a. Cannot be located upon the exercise of due diligence;

b. Has been transferred or sold to, or deposited with, a third part;

c. Has been placed beyond the jurisdiction of the court;

d. Has been substantially diminished in value; or

e. Has been commingled with other property which cannot be divided without difficulty,the United States of America shall be entitled to forfeiture of substitute property under the provisions of Title 21, United States Code, Section 853(p), as incorporated by Title 18, United States Code, Section 982(b)(1)(A).

A True Bill
/s/ Foreman

CHARLES R. WILSON
United States Attorney

By /s/ Thomas W. Tumer
Assistant United States Attorney

By /s/ Ralph E. Hopkins
Managing Assistant U.S. Attorney

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In Re: Glenn H. Martin and Evelyn M. Martin, Debtor

Case No: 92-04238-6J7

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF ORANGE

BEFORE ME, the undersigned authority, personally appeared Leigh R. Meininger, who is personally known to me and who, after being first duly sworn, deposes and says:

1. I am the duly appointed and acting Chapter 7 trustee in the above captioned case.

2. The Martin bankruptcy case is open as of the present time,

3. The trustee has not abandoned any claims that there might be by the debtors against Twentieth Century Life Insurance Company.

FURTHER AFFIANT SAYETH NOT.

/s/ Leigh R. Meininger
Meininger & Meininger, P.A.
2002 East Robinson Street
Orlando, Florida 32803
Phone: (407) 894-0141
Telefax: (407) 894-1936
Florida Bar No: 0765562

[Jurat omitted]

(3)

No. 98-491

FILED
OCT 23 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1998

ADMINISTRATIVE COMMITTEE, WAL-MART STORES, INC. ASSOCIATES HEALTH AND WELFARE PLAN,

Petitioner,

vs.

KIMBERLY SPECIALE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JAMES E. OCASEK
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STATEMENT OF THE CASE

On February 18, 1992, the Respondent, Kimberly Speciale, suffered injuries as the result of an auto accident. Speciale's medical expenses totalled approximately $70,000, with $54,015.07 of that amount being paid through an ERISA benefit plan administered by the Petitioner, Administrative Committee of Wal-Mart Stores, Inc. Associates Health and Welfare Plan. Many of the remaining unpaid providers filed liens pursuant to Illinois law. The underlying tort lawsuit was filed in state court in Kane County, Illinois and was settled between the parties for $45,000, of the $50,000 in available insurance coverage. Because the total claimed liens exceeded not only Speciale's expected net recovery, but even the gross recovery, Speciale then, as a part of and under the caption of the state court case, filed a Motion to Adjudicate Liens, all liens, filed on the state court case. The Petitioner, Administrative Committee of Wal-Mart Stores, Inc. Associates Health and Welfare Plan then removed the action to Federal Court.

The District Court initially denied Speciale's Motion to Remand and the Plan's Motion for Summary Judgment and decided the case on hearing briefs. The District Court, in denying the Motion for Summary Judgment, raised the possibility of the application of the "make whole" rule and Speciale, in her hearing brief, noted that if the court chose to apply the "make whole" rule, the Plan would surely recover nothing. Speciale's primary focus and argument has always remained on the issue of preemption. The Plan, as subrogee or reimbursee, cannot have rights to settlement funds greater than Speciale's and until that amount is determined, the Plan has no basis to assert its interpretations of plan language. The allocation of funds in the state court tort case is a function of the state court and those proceedings are not removable to federal court.

The District Court found that the Plan was entitled to the full amount of the settlement less a reasonable Attorney's fee, leaving the other lienholders and unpaid providers, totalling approximately $16,000, with no settlement proceeds. Speciale filed her appeal, the Plan did not. The Seventh Circuit reversed the District Court's judgment and reversed the denial of Speciale's Motion to Remand. The Seventh Circuit held that the Motion to Adjudicate was an action to apportion funds under state law and did not subject the matter to federal jurisdiction.

REASONS FOR DENYING THE WRIT

Subrogation issues in tort cases can often be more difficult than the case itself. Many times tort recoveries are compromised, due to difficult liability or inadequate liability insurance coverage for the damages. Circumstances in which distribution of funds in state tort cases require court intervention have become increasingly common; many liens can attach to limited funds and an invocation of the court's power regarding liens is even made prior to, and as part of, the settlement process itself to determine priority, applicability and extent. Those claims on the proceeds are an integral part of the case itself. ERISA plans usually require subrogation and/or reimbursement in a monolithic inflexible fashion, but rarely participate in the process of recovery, choosing instead to rely on the beneficiary or attorney to contact them in the end. At the end, plaintiffs' net recoveries are affected by many factors beyond their control. Speciale never raised the issue of the "make whole" rule. It is not the rule in Illinois state cases and was not part of the original Motion to Adjudicate Liens. The District Court raised its possible application in denying the Plan's Motion for Summary Judgment. The issue was prompted by the District Court's concern that it would seem to be inequitable to uphold the Plan's position that it receive the entire settlement, which it did nothing to procure, and leave the Plaintiff with $16,000 in unpaid

medical expense and an unpaid lawyer. In her hearing brief, Speciale acknowledged that its application would benefit her, but, the brief primarily sought confirmation of the liens and a prioritization that placed the Plan in the shoes of the Plaintiff, not ahead of other lienholders and unpaid providers.

There is no disarray in the courts as claimed by the Plan. While aspects of the extent of preemption have been, and continue to be, developing, this Supreme Court's decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company*, 514 U.S. 645, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995), gave a clear signal to the courts that there was a limit to the scope of preemption intended by Congress under ERISA. The Seventh Circuit first followed the teaching of *New York State Conference* in *Blackburn v. Sundstrand*, 115 F.3d 493 (7th Cir. 1997). The Illinois Supreme Court, as well, in *Scholtens v. Schneider*, 173 Ill. 2d 375, 219 Ill. Dec. 490, 671 N.E. 2d 657 (1996). Those cases in the Seventh Circuit cited by the Plan, *Rice v. Panchal*, 65 F.3d 637 (7th Cir. 1995) and *Cutting v. Jerome Foods, Inc.*, 993 F.2d 1293 (7th Cir. 1993) were decided prior to *New York State Conference*. The 1991 case *McGee v. Humbrecht*, Nos. 91-2668, 91-2722 (E.D. La. Sept. 26, 1991), relied almost solely on *FMC Corp. v. Holliday*, 498 U.S. 52, 111 S. Ct. 403, 112 L. Ed. 2d 356 (1990) in denying a Motion to Remand. It preceded *New York State Conference* and, therefore, is no evidence of discontinuity since. On close examination, those District Court cases cited as evidence of the allowance of jurisdiction in situations like this do not support the Plan's contention. *Wright v. Aetna Life Insurance Co.*, 110 F.3d 762 (11th Cir. 1997) was a separately filed Declaratory Judgment seeking interpretation of plan documents. It was filed in state court and removed. The court found that the Summary Plan Description provision on reimbursement was ambiguous, but that a signed reimbursement interpreted that provision. The issue of Federal Jurisdiction was

not raised or addressed in that opinion. There is no indication of a Motion to Remand. *Marshall v. Employers Health Insurance Co.*, Nos. 96-6063, 96-6112, 1997 WL 809997 (6th Cir. Dec. 30, 1997) was also a separately filed Declaratory Judgment seeking to interpret a provision of a plan document and, while the court noted it had jurisdiction, there is no indication that jurisdiction was questioned, that a Motion to Remand was filed. *Ryan by Capria-Ryan v. Federal Express Corp.*, 78 F.3d 123 (3d Cir. 1996) was also a separate Declaratory Judgment with no jurisdictional issue raised. *Cortez v. Michael Reese Health Plan, Inc.*, 980 F. Supp. 277 (N.D. Ill. 1997) was a separate Declaratory Judgment filed in state court where removal was contested. The District Court there relied on, *inter alia*, the District Court's decision in this case, *Speciale v. Seybold*, 951 F. Supp. 740 (N.D. Ill. 1996), since reversed by the Seventh Circuit. *Hartenbower v. Dent*, 963 F. Supp. 712 (N.D. Ill. 1997) involved removal of an entire negligence case based, again, in part on the District Court's opinion in *Speciale* before it was reversed. Neither opinion cited *Blackburn*. *Crump v. Wal-Mart Group Health Plan*, 925 F. Supp. 1214 (W.D. Ky. 1996) involved removal of a cross-claim to a plan's Petition to Intervene for subrogation filed in a state court action. The state court itself severed the cross-claim prior to removal. The cross-claim alleged ERISA violations by the plan and the remainder of the action, including the subrogation Petition, stayed in state court. Of note is the *Crump* court's statement that "no federal subject matter jurisdiction exists solely because an ERISA-authorized plan asserts its subrogation rights in a state tort action. (Citation omitted.)" 925 F. Supp. 1214 at 1217.

The Plan fails to show any widespread confusion or disagreement among the Circuits. Since *New York State Conference*, there has been a clear trend toward following the guidelines it articulated. Even in the Seventh Circuit, which had allowed removal, the decisions of *Blackburn* and *Speciale*

v. Seybold, 147 F.3d 612 (7th Cir. 1998) have set the rule for the District Courts in light of *New York State Conference. Speciale* was correctly decided and the Supreme Court need not re-assert the principles of *New York State Conference.*

ARGUMENT

I.

EXISTING LAW PROVIDES CLEAR DIRECTION ON THIS ISSUE OF REMOVAL

The approach to preemption fashioned by this Supreme Court in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company*, 514 U.S. 645, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995) has appropriately evolved from its initial broad sweep. As is natural, and as expected by Congress, the courts have considered the nature and effect of various contentions regarding issues sought to be included and excluded from ERISA's federal preemption. The courts have focused the jurisdiction to achieve the intent of Congress without unduly burdening themselves with tangential issues that are better handled in other forums. *New York State Conference* involved a hospital surcharge on patients insured by commercial insurers other than Blue Cross/Blue Shield. Its effect was to make it more expensive for ERISA plans and other insurers. While it specifically addressed conflict preemption, it made a thorough analysis of what "relates to" ERISA and what ERISA was meant to encompass. It teaches that there are many aspects of the law and economics which influence an ERISA plan and affects its costs and practices. These influences are laws of general applicability and have only a peripheral connection to a plan. They are not preempted by ERISA because they don't bind administrators to any particular scheme of coverage or regulate a choice of insurers or regulate the plan

itself. The Court, noting its own prior decision in *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 108 S. Ct. 2182, 100 L. Ed. 2d 836 (1988), where the Court found that state law mechanisms which imposed garnishment judgments on plans, thus adding administrative costs, found that indirect sources of economic influence do not trigger preemption. Following the Court's decisions that state law mechanisms which affect the plans, but do so generally as other before the court, the *Blackburn* and *Speciale* appropriately found that those state law mechanisms do not raise a federal question and trigger the complete preemption required for removal.

II.

THE REMOVAL OF MOTIONS TO ADJUDICATE IS INCONSISTENT WITH THE PRINCIPLES OF REMOVAL

The jurisdictional approach urged by the Plan is intrusive, unnecessarily complex and requires the employment of needless fictions. As the Seventh Circuit noted in its *Speciale* opinion, quoting itself from *Blackburn*, "not even the most expansive reading of ERISA covers motor vehicle collisions, just because part of the recovery may inure to the benefit of a plan." 147 F.3d at 616. The same sentiment was voiced in *Crump* when the court discussed the importance of the cross-claim having been severed from the remainder of the action. The removal of a motion to adjudicate or allocate takes one piece of the underlying litigation and it frequently, as here, involves more than just the ERISA plan lienholder. The process of lien adjudication in state tort cases may affect a plan and its recovery in any specific case, but such exercises of ancillary jurisdiction affect all lienholders in a case. These motions do not interpret plan documents or declare ERISA rights. They are not a dispute

between the plan and beneficiary for benefits under the plan, nor an action to enforce rights under the plan. The Plan argues as if its right to subrogate was questioned. (Petition, p. 9.) Both Speciale's argument and the Seventh Circuit pointed out that there is no question raised here as to the Plan's right to subrogation, only which funds in the recovery are allocated to the Plan. No substantive reference to the plan documents is required. The district court cases cited by the Plan were never subject to appellate review and were all decided without the benefit of the Seventh Circuit's Blackburn opinion. The "declaratory judgment" approach they advocated ignores the well-pleaded complaint rule and tortures the "recasting" procedure beyond reason. The "recasting" idea is based on a translation of the claim from allegations of violations of state-imposed duties to allegations of violations of the duties under the comprehensive federal scheme which preempts the state claims. *Rice*. To "recharacterize" the motion as a declaratory judgment for rights under the plan changes the underlying judicial task from allocation to interpretation. As in *Rice*, the focus of the motion to adjudicate is not the plan, so preemption does not apply. In *Rice* the focus was the medical treatment of the plaintiff, here the focus is the settlement fund.

The contentions of the Plan regarding the "true purpose" of Speciale's Motion and arguments regarding the make-whole rule are based entirely on taking portions of the opinions and briefs out of context. The attempt at wordplay fails when the issues are reviewed in context. The Plan claims a subterfuge in attempting to avoid reimbursing the Plan, when what exists is an impossibility to reimburse the Plan in full and a need for allocation. The entire issue of the make-whole doctrine was so tangential to the core issues of the case that it was not even mentioned in the Seventh Circuit's opinion.

III.

THE SEVENTH CIRCUIT CORRECTLY DECIDED THE CASE AND PREVENTS THE CREATION OF SUPER-RIGHTS FOR ERISA SUBROGATION NEVER INTENDED BY CONGRESS

Any consideration of the propriety of the District Court's resolution of the matter and the Seventh Circuit's reversal must address the consequences of adopting the Plan's view that it was entitled to all of the settlement proceeds without consideration of the other lienholders. This was a concern of the District Court, but resolved in favor of the Plan. That result would have granted the Plan greater rights than Speciale had to the proceeds of the recovery. In a subrogation claim the subrogee steps into the shoes of the claimant, in a reimbursement claim the beneficiary pays back out of what she receives. In either situation, all other costs and liens are satisfied before the plaintiff has money. Congress did not include any specific subrogation legislation in ERISA. The plan is a contractual arrangement between the plan and its participants. The participants cannot give more to the plan than they have and cannot assign to the plan rights to recovery greater than those granted under state law. Accordingly, a plaintiff cannot assign her rights to proceeds that are never receivable by her. She is only entitled to proceeds remaining after the liens provided for by state law have been satisfied, by state law adjudication if necessary. A plan does not have the right to decide the law, just as a plan cannot, in its discretion, decide liability or make a plaintiff pay if she loses a case the plan felt should have been won.

CONCLUSION

For the reasons given above the Petition should be denied.

Respectfully submitted,

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No. 98-491

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In The
Supreme Court of the United States

October Term 1998

ADMINISTRATIVE COMMITTEE, WAL-MART STORES, INC. ASSOCIATES HEALTH AND WELFARE PLAN,
Petitioner,

v.

KIMBERLY SPECIALE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. There Is A Significant Split In The Circuits On The Reimbursement Issue Presented

In her Brief in Opposition, Respondent Kimberly Speciale ("Speciale") seeks to avoid this Court's review by claiming there is no split in the circuits because the issue of removal jurisdiction was not specifically discussed in all of the circuit and district court decisions cited in the Petition for Writ of Certiorari filed by the Wal-Mart Stores, Inc. Associates Health and Welfare Plan ("Plan" or "Petitioner"). Of the cases cited by the Plan which conflict with the Seventh Circuit's decision below, *Marshall v. Employers Health Ins. Co.* Nos. 96-6063, 96-6112, 1997 WL 809997 (6th Cir., Dec 30, 1997), *Rice v. Panchal*, 65 F.3d 637 (7th Cir. 1995), *Engle v. Wal-Mart Associates Health & Welfare Plan*, No. 2:97-CV-317-TS (N.D. Ind. Jan 14, 1998), *Cortez v. Michael Reese Health Plan, Inc.* 980 F.Supp. 277 (N.D. Ill. 1997), *Crump v. Wal-Mart Group Health Plan*, 925 F.Supp. 1214 (W.D. Ky. 1996), and *McGee v. Humbrecht*, Nos. 91-2668, 91-2722 (E.D. La. Sept. 26, 1991) involve express rulings on the removal issue. The remainder of the conflicting cases cited by the Plan, including *Wright v. Aetna Life Ins. Co.*, 110 F.3d 762 (11th Cir. 1997), *Ryan v. Federal Express Corp.*, 78 F.3d 123 (3rd Cir. 1996), *Cutting v. Jerome Foods, Inc.*, 993 F.2d 1293 (7th Cir. 1993), and *Harkenbower v. Dent*, 963 F.Supp. 712 (N.D. Ill. 1997) assume without significant discussion that federal court jurisdiction upon removal was proper.

Speciale contends that the lack of substantive discussion means that the latter line of cases cited above does not reflect additional conflict in the circuits. What Speciale forgets is that federal courts are not courts of general jurisdiction and that they have a duty to determine

whether jurisdiction exists even if the parties are prepared to concede it. *Steel v. Citizens for a Better Environment*, ___ U.S. ____, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). This is particularly true of the three federal appellate courts in *Wright*, *Ryan* and *Cutting* which assumed, like most others, that federal question of jurisdiction existed where a state court plaintiff filed a claim against a benefit plan to reduce or avoid reimbursement to the plan (i.e., retain benefits). As this Court recently held in *Steel Co.*:

> Every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties were prepared to concede it. [Citations omitted]. 'And if the record discloses that the lower court was without jurisdiction, this court will notice the defect, although the parties make no contention concerning it.'

Steel v. Citizens for a Better Environment, 1998 U.S. LEXIS 1601, at *21. Thus, implicit in *Wright, Ryan* and *Cutting* are holdings that those appellate courts had federal question removal jurisdiction under ERISA, just as Petitioner maintains should have been recognized in the instant case by the court below. As such, five federal appellate courts and at least five federal district courts differ with the court below and would uphold the Plan's removal and the District Court's decision below. This reflects significant dissension among the federal courts, warranting review by this Court.

II. Speciale's Conflict Preemption Analysis Does Not Apply.

Confusing complete preemption analysis with conflict preemption, Speciale contends that *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 115 S. Ct. 1671, 131 L.Ed.2d 695 (1995), precludes preemption in this case. As the Seventh Circuit itself has noted in *Rice v. Panchal*, "conflict preemption" under § 514(a) of ERISA is a separate and independent issue from "complete preemption" under § 502(a) of ERISA. *Rice v. Panchal*, 65 F.3d at 639. Conflict preemption arises only as a defense to a state law action. Conflict preemption can never give rise to federal court jurisdiction upon removal from state court. *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 145, 111 S.Ct. 478, 486, 112 L.Ed.2d 474 (1990). Complete preemption, on the other hand, is an exception to the well-pleaded complaint rule allowing federal court removal jurisdiction for claims within the scope of § 502(a)(1)(B) of ERISA. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64, 66, 107 S.Ct. 1542, 1546-48, 95 L.Ed.2d 55, (1987). Petitioner has never taken the position that conflict preemption applies to this case. Speciale's Petition to Adjudicate filed against the Plan in state court is a civil action seeking to recover benefits claimed by the Plan (by retaining them) and/or to enforce rights under the terms of the Plan through "common fund" and "make whole" relief. Indeed, this is the very relief claimed by Speciale in the District Court below. Regardless of how it is couched, the Petition to Adjudicate is completely preempted by ERISA and recast as a claim under § 502(a)(1)(B) of ERISA for the same relief.

Further, even applying the *New York State Conference* decision, it is clear this Court has not departed from its recognition of the importance of uniformity in the

area of reimbursement requirements under ERISA. Indeed, in *New York State Conference*, this Court reaffirmed its adherence to *FMC Corp. v. Holliday*, as follows:

> Similarly, Pennsylvania's law that prohibited 'plans from ... requiring reimbursement [from the beneficiary] in the event of recovery from a third party' related to employee benefit plans within the meaning of § 514(a). *FMC Corp v. Holliday*, 498 U.S. 52, 60, 112 L.Ed.2d 356, 111 S. Ct. 403 (1990). The law 'prohibited plans from being structured in a manner requiring reimbursement in the event of recovery from a third-party' and 'required plan providers to calculate benefit levels in Pennsylvania based on expected liability conditions that differ from those in states that have not enacted similar anti-subrogation legislation,' thereby 'frustrating plan administrator's continuing obligation to calculate uniform benefit levels nationwide.' *Ibid.* Pennsylvania employees who recovered in negligence actions against tortfeasors would, by virtue of the state law, in effect have been entitled to benefits of excess of what plan administrators intended to provide, and in excess of what the plan provided to employees in other States.

New York State Conference, 514 U.S. at 657-58. Had Speciale sued under a state anti-subrogation provision, such claim would be preempted under conflict preemption and would have been met by a motion to dismiss from the Plan. Instead, Speciale filed a generic request for the state court to adjudicate her obligations for repayment of benefits to

the Plan. The Petition to Adjudicate is completely preempted, and removal was proper.

III. Speciale's Brief Admits Of The Need For Removal

Speciale urges the use of fiction to convert this ERISA case back into the tort case from which it arose. It is uncontroverted that the underlying tort case filed by Speciale had settled and that she then filed a Petition to Adjudicate the settlement funds. Rather than acknowledge the fiction, Speciale argues in her Brief in Opposition at 6, the holding in the opinion below:

> Not even the most expansive reading of ERISA covers motor vehicle collisions, just because part of the recovery may inure to the benefit of the plan.

Continuing to ignore the fact that the tort case has long been settled, Speciale continues the fiction in her Brief in Opposition, at 6, as follows:

> The process of lien adjudication in state court cases may affect a plan and its recovery in any specific case, but such exercises of ancillary jurisdiction affect all lienholders in a case. These motions do not interpret the plan documents or declare ERISA rights.... No substantive reference to the plan documents is required .... To 'recharacterize' the motion as a declaratory judgment for rights under the plan changes the underlying judicial task from allocation to interpretation.

This is a distinction without a difference. Allocation of settlement proceeds to a self-funded ERISA plan *ipso facto* requires interpretation and application of the Plan as a matter of federal law. *See, e.g., Ryan v. Federal* Express, 78 F.2d at 127-28 (citing *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353 (9th Cir. 1984), *cert. denied*, 474 U.S. 865, 106 S. Ct. 183, 88 L.Ed.2d 152 (1985), and *Craig v. Bemis Co.*, 517 F.2d 677, 684 (5th Cir. 1975) for the requirement of following the terms of the benefit plan in determining reimbursement). The purported distinction raised by Speciale also points to the motive behind the filing of such state law petitions to adjudicate as a way to ignore and defeat the legitimate interests of ERISA benefit plans. In effect, what Speciale admits in her Brief in Opposition is that she was trying to use the state court to adjudicate her obligations to the Plan without looking at or giving effect to the Plan documents at all. To allocate settlement funds, over which the Plan has an express reimbursement right, necessarily requires interpretation of the Plan documents.

There can be no question that the Petition to Adjudicate Speciale's benefit repayment obligations has the effect of a declaratory judgment to determine how much Speciale owes the Plan in reimbursement. Such claim must be recast as a civil action to recover benefits and/or enforce rights under the terms of the Plan. If Speciale is allowed to ignore the necessary impact and effect of the Petition to Adjudicate, then she is allowed to redraft the provisions of the Plan documents through artful pleading which attempts to ignore the Plan while at the same time adjudicating the Plan's interests. To allow the decision below to stand would continue a significant split in the circuits and frustrate the law and spirit of ERISA, particularly where a national, self-funded benefit plan is at issue.

IV. Speciale's Brief Misstates The Facts And Law Regarding The Effect Of A Reversal By This Court.

Speciale's Brief in Opposition claims that the District Court's decision below would have granted the Plan greater rights than Speciale had to the proceeds of the recovery. Confusing subrogation and reimbursement, Speciale argues that "participants cannot give more to the Plan than they have and cannot assign to the Plan rights to recover greater than those granted under state law." Brief in Opposition at 8. These claims are erroneous for several reasons. First, Speciale confuses reimbursement with subrogation. As stated by the Seventh Circuit:

> Unlike subrogation, which arises under state law and allows the insurer to stand in the shoes of its insured, reimbursement is a contractual right governed by ERISA and comes into play only after a plan member has received personal injury compensation.

Unisys Medical Plan v. Timm, 98 F.3d 971, 973 (7th Cir. 1976). Subrogation allows an insurer to stand in the shoes of the injured person and to litigate a claim for the injured person against the at-fault party. To the extent the insurer makes a recovery over and above the subrogation interest, that money is paid to the injured party. Reimbursement arises only after the plaintiff has received a settlement of claims. *Id.*

Speciale sued the at-fault party, which suit resulted in a settlement. Only after the lawsuit was pursued and settled by way of a monetary recovery, was the Plan involved. This involvement can only be reimbursement, a contractual right governed by ERISA. The Plan did not stand in the shoes of Speciale; she stood in them herself and

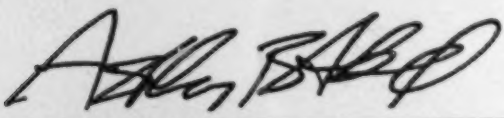
sued the tortfeasor. Reversal of the court below would allow a federal court to review the amount and nature of the settlement under the terms of the Plan and make a determination of Speciale's obligation to repay benefits to the Plan. This is precisely what the District Court did prior to being reversed by the court below. Because the interest at issue is reimbursement, the claim of creating greater rights through subrogation has no merit and, beyond that, is not involved in this case at all.

CONCLUSION

If the Seventh Circuit decision below is allowed to stand, state law Petitions to Adjudicate will ignore and defeat express reimbursement language in ERISA self-funded plans. Speciale's Brief ignores the wide disparity of views on this important jurisdictional issue in the federal system and admits of the basis for complete preemption. The Petition for Certiorari should be granted and the Seventh Circuit decision below reversed.

Dated: November 19, 1998
Greenville, South Carolina

Respectfully submitted,



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